ORIGINAL

No. 01-7662

(3)

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A DEATH PENALTY CASE.
MR. MILLER-EL IS SCHEDULED TO BE EXECUTED ON FEBRUARY 21, 2002.

Jim Marcus*
Elizabeth Detweiler
TEXAS DEFENDER SERVICE
412 Main Street
Suite 1150
Houston, Texas 77002
TEL (713) 222-7788
FAX (713) 222-0260

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* Counsel of Record for Thomas Joe Miller-El

199 pp

APPENDICES

1. *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001).
2. *Miller-El v. State*, No. 69, 677 (Tex. Crim. App. Sept. 16, 1992).
3. Findings of Fact, Conclusions of Law, and Order, *Ex parte Thomas Joe Miller-El*, No. 85-78668-L (Dist. Ct. of Dallas County, Criminal District Court Number Five, April 16, 1996).
4. Order, *Ex Parte Miller-El*, Writ No. 31,000-01 (Tex. Crim. App. Jun. 17, 1996).
5. Findings and Recommendations of the United States Magistrate Judge, *Miller-El v. Johnson*, No. 3-96-CV-1992-H (N.D. Tex. Jan. 31, 2000).
6. Memorandum Opinion and Order, *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000).
7. *Miller-El v. Johnson*, No. 00-10784 (5th Cir. Sept. 12, 2001) (Order On Petition for Rehearing and Rehearing *En Banc*).
8. *Jury Selection in a Criminal Case*, Memorandum, Jon Sparling.
9. Affidavit of Ms. Jennifer Balido.
10. Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, Mar. 9, 1986, at A1 (photocopy).
11. Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, Mar. 9, 1986, at A1 (Westlaw reprint).
12. Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986, at A1 (photocopy).
13. Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986, at A1 (Westlaw reprint).
14. Juror Questionnaire of Joe Warren.

U.S. COURT OF APPEALS
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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-10784

THOMAS JOE MILLER-EL,

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before JONES, DeMOSS and PARKER, Circuit Judges.

DeMOSS, Circuit Judge:

Petitioner Thomas Joe Miller-El ("Miller-El"), who was convicted of capital murder in Texas state court and who was sentenced to death therefor, and whose petition for habeas corpus relief and request for a Certificate of Appealability ("COA") therefrom were both denied by the federal district court below, now seeks from this Court a COA pursuant to 28 U.S.C. § 2253(c)(2)..

For all of the reasons set forth below, we DENY the request for a COA.

I. BACKGROUND

In 1985, Miller-El's wife, Dorothy Miller-El, was employed as a night maid for the lobby area of the Holiday Inn South. She arranged for a religious convention for the Moorish Science Temple's Feast on November 8-10, 1985. Her husband was among the attendees. After the convention, Dorothy did not return to work. Shortly before midnight on November 15, 1985, Dorothy returned to the Holiday Inn claiming that she was there to pick up her paycheck. She was given access to the office area near the vault.

During this time period, four hotel employees were working, Doug Walker, Donald Hall, Anthony Motari, and Mohamed Ali Karimijoji. Hall, the chief auditor, was training Mohamed regarding the hotel's daily closing procedures. Hall instructed Mohamed to close out the cash registers, a process which would take one-half hour. Mohamed encountered a woman who claimed that she needed accompanying while she waited for her ride. Mohamed sent her to the front desk area without leaving the locked area he was in.

At the front desk, a man later identified as Miller-El appeared and requested a room from Hall. Witnesses identified Miller-El from having seen him at the Moorish Feast convention the previous week. A younger man, later identified as Kenneth Flowers

and dressed in army fatigues and a headset, peered around the corner as Hall was giving Miller-El his room key, and once spotted by Hall, he also approached the counter. Miller-El told Hall that he would be needing two beds. Seconds later, Miller-El and Flowers pulled out weapons. Miller-El brandished a semi-automatic "tech" nine millimeter machine gun, with a flash suppressor for night use. Flowers had a .45 caliber hand gun.

Hall complied with Miller-El's instructions to empty the cash drawer and place the money on the counter. Miller-El then ordered Hall to bring any other people in the back out front. Hall instructed Walker to come out. Flowers jumped over the counter and the two men instructed Hall and Walker to lay on the floor. The two men led Hall and Walker to the bellman's closet which they ordered opened. Once the two men removed all of the valuables from the closet and took Walker's and Hall's wallets, Miller-El tied Walker's hands behind his back, tied his legs together, and gagged him with strips of fabric. Flowers did the same to Hall. Walker was laid on his face and Hall was laid on his side.

Miler-El asked Flowers if he was going to "do it" and Flowers responded that he couldn't. Flowers then left. Miller-El stood at Walker's feet, removed his glasses and then shot Walker in the back two times. Hall closed his eyes after the first shot. He heard two more shots and realized that he had also been wounded. Hall tried to talk to Walker but only heard him choking. When he heard

familiar voices outside, Hall screamed for help.

Several days after the robbery-murder, Officer Cagle was on surveillance of an apartment complex believed to be Dorothy Miller-El's. He spotted Dorothy and Flowers. With the assistance of back-up units, he stopped their vehicle and arrested them both. Search warrants were executed for the residence, and "walkie-talkie" headsets were found. When Miller-El was later arrested, found in his possession was an arsenal of weapons including the "tech" nine millimeter murder weapon.

II. PROCEDURAL HISTORY

Miller-El pleaded not guilty to and in March 1986 was tried before a jury on the charge of capital murder during the course of committing a robbery. On March 24, 1986, the jury returned with a guilty verdict and at the conclusion of the sentencing phase, the same jury answered in the affirmative to the special issues set forth in the Texas Code. Accordingly, the trial court imposed upon Miller-El the sentence of death.

Miller-El's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. On December 14, 1992, that court affirmed Miller-El's conviction and sentence in an unpublished opinion. *See* ***Miller-El v. State***, No. 69,677 (Tex. Crim. App. 1992)(en banc)(unpublished). And on October 4, 1993, the Supreme Court denied Miller-El's petition for writ of certiorari. *See* ***Miller-El v. Texas***, 114 S. Ct. 100 (1993).

Miller-El then filed an application for state habeas relief. The state trial court judge entered findings of fact and conclusions of law recommending denial of Miller-El's state habeas petition. On June 17, 1996, the Texas Court of Criminal Appeals adopted the trial judge's findings of fact and conclusions of law and denied Miller-El's application for state habeas corpus relief. *See* ***Ex parte Miller-El***, No. 31,001-01 (Tex. Crim. App. 1996) (unpublished).

On June 17, 1997, Miller-El filed his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in federal district court. On August 12, 1997, Miller-El filed an amended petition for habeas corpus. Miller-El's petition was referred to a magistrate judge who, on January 31, 2000, issued findings and conclusions, recommending a denial of relief. On June 5, 2000, after receiving objections and conducting a hearing on the magistrate judge's report and recommendation, the district court adopted the magistrate's findings and conclusions and denied Miller-El's petition for a writ of habeas corpus. The district court subsequently denied Miller-El's motion to alter or amend the final judgment denying relief on June 21, 2000. Miller-El then filed a notice of appeal in this Court and a motion for a COA in the district court. On August 14, 2000, the district court denied Miller-El's request for a COA on each of the issues raised herein. It is Miller-el's renewed request for a COA that is presently

before us.

III. DISCUSSION

Miller-El seeks from this Court a COA on each of the following issues: (1) whether the district court erred in overruling his challenges of improper peremptory juror strikes; (2) whether the state court erred in failing to conduct a *sua sponte* evidentiary hearing regarding his competency to stand trial and in finding that he was competent to stand trial in 1986; (3) whether the district court likewise erred in failing to conduct a hearing regarding his competency; and (4) whether the district court erred finding that his First and Fourteenth Amendment rights were not violated by admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple..

Miller-El's petition for writ of habeas corpus was filed on June 17, 1997, and is thus governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* ***Lindh v. Murphy***, 117 S. Ct. 2059, 2068 (1997); ***United States v. Carter***, 117 F.3d 262 (5th Cir. 1997). Under AEDPA, before an appeal from the dismissal or denial of a § 2254 habeas petition can proceed, the petitioner must first obtain a COA, which will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The same standards that governed issuance of the pre-AEDPA version of the COA, the certificate of probable cause ("CPC"), apply to requests for a COA.

See ***Slack v. McDaniel***, 120 S. Ct. 1595, 1603 (2000). A petitioner makes a "substantial showing" when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. *See* ***id.*** at 1603-04.

Additionally, pursuant to § 2254(e)(1), a state court's determination of a factual issue must be presumed correct, and the habeas petitioner bears the burden of rebutting the presumption by clear and convincing evidence. The presumption of correctness is especially strong, where, as here, the trial court and the state habeas court are one and the same. *See* ***Clark v. Johnson***, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 121 S. Ct. 84 (2000).

And while the nature of the penalty in a capital case is an appropriate consideration for determining whether to issue a COA, the severity of the penalty at issue does not, in and of itself, *require* the issuance of a COA. *See* ***Clark***, 202 F.3d at 764 (citing ***Lamb***, 179 F.3d at 356). However, in capital cases, doubts as to whether a COA should issue must be resolved in favor of the petitioner. *See* ***Lamb***, 179 F.3d at 356. Cognizant of the foregoing principles, we turn now to consider those issues raised by Miller-El in his request for a COA.

A.

Miller-El first contends that he is entitled to a COA

regarding his challenge to the prosecution's alleged improper use of peremptory strikes to exclude African-Americans from his jury. Miller-El argues that the Supreme Court's decision in ***Swain v. Alabama***, 85 S. Ct. 824 (1965), is still the applicable law regarding challenges to improper peremptory strikes when evidenced by data indicating historic, systematic discrimination against African-Americans. However, during the pendency of Miller-El's direct appeal, the Supreme Court decided ***Batson v. Kentucky***, 106 S. Ct. 1712 (1986), in which it stated that "[t]o the extent that anything in ***Swain v. Alabama*** is contrary to the principles we articulate today, that decision is overruled." ***Batson***, 106 S. Ct. at 1725. Yet Miller-El contends that ***Batson*** only overruled one part of ***Swain***. According to Miller-El, while under ***Batson***, a defendant is no longer required to establish a prima facie case of racial discrimination based upon proof of historical, consistent, and systematic exclusion of African-Americans from juries, if racial discrimination is proffered, nevertheless, under ***Swain***, then *either* the ***Swain*** or ***Batson*** evidentiary formulations apply. Miller-El argues that the evidentiary formulation of ***Swain*** is, thus, applicable to his claim of systematic exclusion. The government contends that the ***Batson*** evidentiary formulation overruled the ***Swain*** formulation on which Miller-El relies.

Under ***Swain***, a defendant was required to show the prosecutor's

"systematic use of peremptory challenges against Negroes over a period of time" as a predicate. *See* ***Swain***, 85 S. Ct. at 839. Assuming that a defendant would be able to demonstrate a historical pattern of discrimination continuing unabated to the defendant's trial, the burden would then shift to the prosecutor to rebut the defendant's allegations. *See* ***Alexander v. Louisiana***, 92 S. Ct. 1221, 1226 (1972). To satisfy his burden, the prosecutor could do one of two things. First, the prosecutor could show that the systematic disparity resulted from racially-neutral selection procedures. Second, the prosecutor could "show neutral reasons for the striking of all the blacks in petitioner's trial itself." ***Willis v. Zant***, 720 F.2d 1212, 1220-21 (11th Cir. 1983). However, in any case under ***Swain***, we have held that it is not sufficient to prove a ***Swain*** violation based solely on statistical evidence from prior trials without some concomitant showing that the intentional and systematic discrimination continued "unabated" through to the petitioner's trial. *See* ***Evans v. Cabana***, 821 F.2d 1065, 1068 (5th Cir. 1987). Additionally, the prosecutor could rebut the petitioner's showing with a showing of neutral reasons. Miller-El argues that his showing under ***Swain*** requires only a showing of historical and systematic discrimination in order to establish a prima facie case.

In ***Batson***, the Supreme Court, recognizing the "crippling burden of proof" which ***Swain*** created, replaced the ***Swain***

evidentiary formulation with the new *Batson* standard. That new standard involves the following three steps:

> First: A defendant can establish his prima facie case of purposeful discriminatory petit jury selection solely upon evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Alternatively, the defendant can make a prima facie case by proving historic, systematic discrimination;
>
> Second: If a defendant makes a prima facie showing, the burden then shifts to the government to provide a race-neutral explanation for challenging the excluded jurors;
>
> Third: The trial court must then determine if the defendant has established purposeful discrimination, and the trial court's determination is a finding fact entitled to the applicable level of deference on appellate review.

See Batson, 106 S. Ct. at 1723-24.

Despite Miller-El's contention that the *Swain* evidentiary framework was untouched by *Batson*, the Supreme Court has itself explicitly stated "we reject [*Swain's*] evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* at 1721; *see also Georgia v. McCullum*, 112 S. Ct. 2348 (1992) (stating that "[i]n *Batson v. Kentucky*, [] the Court discarded *Swain's* evidentiary formulation").

With respect to the second step in the *Batson* analysis, the

Court stated specifically:

> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's [race-neutral] explanation need not rise to the level justifying exercise of a challenge for cause.

Batson, 106 S. Ct. at 1723. Miller-El suggests that contrary to the above language in step two of the *Batson* evidentiary framework, the level of explanation required to rebut the prima facie case is governed by the rebuttal stage of the evidentiary formulation of *Swain* and is a "heavy burden." However, as we have noted, the Supreme Court has explicitly overruled the evidentiary formulation of *Swain* to the extent that it would contradict any principle, evidentiary or otherwise, announced in *Batson*. *See id.* at 1725. Thus, to the extent that the two burdens of rebuttal in *Swain* and *Batson* are inconsistent, the Supreme Court has mandated that the standard in *Batson* be applied. Here, *Batson* was decided during the pendency of Miller-El's direct appeal, and it is, thus, the applicable standard for analyzing his challenge to the use of peremptory juror strikes. *See Griffith v. Kentucky*, 107 S. Ct. 708 (1987) (holding that *Batson* governs claims by defendants whose appeals were pending and non-final at the time *Batson* was decided).

Miller-El contends that the state court's adjudication was an

unreasonable application of *Batson* and that the court's findings were also unreasonable in light of his prima facie showing. His primary challenge is to the district court's alleged failure to give proper weight and credit to the evidence which he presented regarding the historical data evidencing exclusion of African-American jurors.

The state court findings in this case on the issue of discriminatory intent, despite Miller-El's protestations to the contrary, are entitled to great deference. *See Hernandez v. New York*, 111 S. Ct. 1859, 1868 (1991). As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

The detailed factual findings made by the state trial court establish that each of the challenged African-American jurors was stricken on race-neutral grounds. Miller-El has addressed the peremptory challenge of six of the ten *Batson* jurors in his request for a COA. We have now conducted an independent review of the findings of the state court and of the evidence presented by Miller-El in his application. Suffice it to say, and without commenting on each of the challenged jurors and the reasons

proffered for their being excluded, we find that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary. The findings of the state court that there was no disparate questioning of the *Batson* jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record.

Having determined that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court, we conclude that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further. Miller-El has thus failed to make a substantial showing of the denial of a constitutional right. Accordingly, we deny Miller-El's request for a COA on this issue.

B.

Miller-El's second issue consists of two parts that revolve around his claim that he was incompetent to stand trial. He first claims that the state trial court erred in failing to provide him with a *sua sponte* evidentiary hearing pursuant to *Pate v. Robinson*, 86 S. Ct. 836 (1966). Second, he challenges his conviction as

infirm under ***Dusky v. United States***, 80 S. Ct. 788 (1960), on the basis that he was incompetent, in fact, at the time of his trial. Before analyzing these claims, a brief review of some additional facts is necessary.

Miller-El was tried some eight weeks following his arrest. Incident to his arrest, Miller-El was wounded by a gunshot. During the months following his arrest, Miller-El underwent surgical treatment for his injuries, and he experienced complications such as weight loss. On three separate occasions during his trial, Miller-El was evaluated by a doctor at the direction of the trial court. First, during jury selection, he experienced chest pains, chills, and a fever. He was diagnosed with pneumonia and was treated and discharged the same day. Nine days later, still during jury selection, Miller-El complained of delays in receiving medication. The trial court ordered a second evaluation to determine if Miller-El needed more medication. The doctor determined that he did not. Two days before jury selection concluded, Miller-El was taken to the hospital for treatment of a chest abscess. During his trial, Miller-El complained of pain in his ribs and asked to see a doctor. And finally, on the evening of the day he was found guilty, the trial judge ordered a medical evaluation to determine if Miller-El would be able to sit through court after complaining of nausea and colostomy bag complications. He was kept overnight in the hospital and was released the next day

when the punishment phase of his trial began.

Miller-El complains that he was denied a competency hearing at trial and that his due process rights were denied because whenever evidence raises a sufficient doubt about the mental capacity of the accused to stand trial, a hearing is required. ***See Drope v. Missouri***, 95 S. Ct. 896, 908 (1975); ***Pate***, 86 S. Ct. 836. Miller-El contends that the evidence raised a sufficient doubt as to his competency.

In ***Carter v. Johnson***, 110 F.3d 1098 (5th Cir. 1997), we explained the procedural inquiries and burdens required for the two competency claims Miller-El asserts. Specifically, we summarized as follows:

> The issue of competency may arise in two distinct contexts. ***See United States v. Williams***, 819 F.2d 605, 607-09 (5th Cir. 1987); ***Lokos v. Capps***, 625 F.2d 1258, 1261-62 (5th Cir. 1980). We must distinguish between them for purposes of the present case.
>
> First, a habeas petitioner may allege that state procedures were inadequate to ensure that he was competent to stand trial. A trial court must conduct an inquiry into the defendant's mental capacity sua sponte if the evidence raises a bona fide doubt as to competency. ***Pate v. Robinson***, 383 U.S. 375, 86 S. Ct. 836, 15 L.Ed.2d 815 (1966). If the trial court receives evidence, viewed objectively, that should raise a reasonable doubt as to competency, yet fails to make further inquiry, this constitutes a denial of a fair trial. *See Lokos*, 625 F.2d at 1261. If a *Pate* violation is established, the federal habeas court must consider whether a meaningful hearing can be held nunc pro tunc to determine retrospectively the petitioner's competency as of the time of trial. *Id.* at 1262. If so, the petitioner bears the burden of proving his incompetence by a preponderance of the

evidence; if not, the habeas writ must issue, subject to retrial at the state's discretion. *Id.* This *Pate* procedural guarantee is not before us, having been expressly abandoned by Carter on appeal.

> Second, a habeas petitioner may collaterally attack his state conviction by directly alleging incompetence at the time of trial, thereby claiming a violation of the substantive right not to be tried and convicted while incompetent, rather than of the procedural guarantee of a competency hearing in the event that a bona fide doubt arises at trial as to competency:
>
> It is always open for the defendant to later assert his actual incompetence at trial in a subsequent collateral proceeding, but the substantive claim should not be confused with a defendant's procedural rights under Pate to a hearing whenever a bona fide doubt as to competence surfaces at trial.

Carter v. Johnson, 131 F.3d 452, 458 n.10 (5th Cir. 1997).

First, with respect to whether Miller-El was entitled to a hearing, the relevant inquiry is whether the district court received information "which, if objectively considered, should reasonably have raised a doubt about the defendant's competency and alerted [it] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos*, 625 F.2d at 1261. In this case, the trial court specifically found that Miller-El was competent to stand trial, both at the trial and again on state habeas review. Specifically the court found:

> (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his

> defense; and (3) a competency hearing was not required because "there was no 'bona fide doubt' as to [petitioner's] competence to stand trial.

Our independent review of the record evidence convinces us that the district court's finding that Miller-El was not entitled to a hearing is not unreasonable, and Miller-El has failed to present clear and convincing evidence to the contrary.

With respect to whether Miller-El was, in fact, incompetent, we find that the district court's conclusion that he was not, is reasonable, and likewise, we find that the state court's decision does not represent an unreasonable application of federal law. Thus, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right, and we deny Miller-El's request for a COA on this issue.

C.

In his third issue, Miller-El claims that he is entitled to a COA because the federal district court erred in refusing to conduct an evidentiary hearing *nunc pro tunc* to determine whether he was competent to stand trial in 1986. Having concluded above that Miller-El has failed to establish a bona fide doubt as to his competency at trial under *Pate* and that the state court's determination of competence was reasonable, we need not readdress this issue.

A state court's competency determination is a finding of fact entitled to a presumption of correctness under § 2254(d)(2). And

we have stated that "[b]efore the federal district court has a duty to investigate a habeas petitioner's claim of incompetency, the petitioner must show that there are sufficient facts to 'positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during trial.'" ***Moody v. Johnson***, 139 F.3d 477, 481 (5th Cir. 1998) (quoting *Washington v. Johnson*, 90 F.3d 945, 950 (5th Cir. 1996)). Under Section 2254(e)(1), a habeas petitioner is entitled to a *nunc pro tunc* evidentiary hearing for the purpose of proving that he was incompetent at the time he stood trial only when he "makes a showing by clear and convincing evidence to raise a threshold doubt about his competency." ***Lokos***, 625 F.2d at 1261. This threshold burden is "extremely heavy," ***Johnson v. Estelle***, 704 F.2d 232, 238 (5th Cir. 1983), and requires that a petitioner present facts sufficient to "positively, unequivocally, and clearly generate a real, substantial and legitimate doubt" concerning his mental competence, *id.* at 238. *See also* ***Jackson v. Anderson***, 112 F.3d 823 (5th Cir. 1997) (noting that § 2254(e)(1) places a heavier burden on petitioners seeking to rebut state court fact findings).

Miller-El suggests that he was entitled to an evidentiary hearing in the federal district court because he was not given a live hearing in the state court. The state habeas court instead based its decisions upon the parties' supplemental briefing and

expert affidavits, i.e, Miller-El received only a paper hearing. We find Miller-El's suggestion untenable, especially where, as here, the trial judge and the state habeas judge were the same. *See* ***Clark v. Johnson***, 202 F.3d at 766 ("we have repeatedly found that a paper hearing is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims, especially where . . . the trial court and the state habeas court were one in the same.").

We conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right on this issue in that he has failed to rebut the presumptive correctness of the state habeas and district court findings that he was competent to stand trial in 1986 and that he was not entitled to a *nunc pro tunc* hearing to determine competency. Accordingly, we deny Miller-El's request for a COA on this issue.

D.

In his fourth and final issue, Miller-El argues that he is entitled to a COA on his claim that his First and Fourteenth Amendment rights were violated by the admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple faith in violation of ***Dawson v. Delaware***, 112 S. Ct. 1093 (1992). In ***Dawson***, while the Supreme Court held that where religious affiliation unrelated to any issue in the case may be impermissible, there is no "per se" barrier to

the admission of evidence which concerns a defendant's beliefs and associations at sentencing. *Dawson*, 112 S. Ct. at 1097. The Court noted that "[i]n many cases . . . associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." *Id.* at 166. We have, likewise, held that if the evidence regarding a defendant's affiliations or personal beliefs is sufficiently related to the issues involved, there is no constitutional violation. *See Boyle v. Johnson*, 93 F.3d 180, 183-84 (5th Cir. 1996).

Here the state habeas court concluded that Miller-El's association with the Moorish Science Temple was inextricably intertwined with his conviction and sentence. Evidence was entered in the guilt phase regarding his membership as part of testimony regarding witnesses' ability to identify him through his participation in the Moorish Temple Feast at the murder scene the week before the robbery-murder. Thus, introduction of this evidence during the guilt phase was relevant to other matters.

The additional references to his membership during the punishment phase of his trial, as the state court found, were appropriate as they related to his involvement with other group members who were heavily armed and who assisted in the commission of Miller-El's offense of conviction. The government's characterization of Miller-El as belonging to a heavily armed paramilitary group was supported by the evidence and was probative

as an indicator of future dangerousness.

Having conducted an independent review, we conclude simply that the state court's determination that Miller-El's due process rights were not violated by the prosecution's reference to his membership in the Moorish Science Temple faith were consistent with and were not contrary to the Supreme Court's applicable holding in *Dawson*. Furthermore, we conclude that the state court's adjudication of this claim was reasonable, and therefore, we deny Miller-El's request for a COA on this issue.

IV. CONCLUSION

Having carefully reviewed the record, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right with respect to any of the issues raised in his request for COA, and accordingly, we DENY his request for COA on all issues raised therein.

THOMAS JOE MILLER-EL, Appellant

NO. 69,677 v. - - - - Appeal from the Criminal District Court No. 5 [DALLAS County]

THE STATE OF TEXAS, Appellee

O P I N I O N

Appellant was convicted of Capital Murder for shooting to death an Irving motel clerk during the course of committing Robbery. See V.T.C.A., Penal Code, Section 19.03 (a)(2). The historical facts of this case are reported at Miller-El v. State, 782 S.W.2d 892, 893-894 (Tex.Cr.App. 1990). Punishment was assessed at death. See Art. 37.071 (b), V.A.C.C.P. Appeal to this Court is automatic. See Art. 37.071 (h), V.A.C.C.P.; Tex.R.App.Proc. 40 (b)(1).

I.

In his first seven points of error appellant makes various complaints related to the allegedly intentional exclusion of black veniremembers from jury service by the prosecuting attorneys in this case. See Swain v. Alabama, 380 U.S. 202 (1965); Strauder v. West Virginia, 100 U.S. 303 (1880). To the extent that these points implicate a claimed Sixth Amendment right to a petit jury reflecting a fair cross-section of appellant's community, we note only that such right has not been recognized by the Supreme Court, nor is its recognition by that Court anticipated by this one. Holland v. Illinois, 493 U.S. 474 (1990); Seubert v. State, 787 S.W.2d 68 (Tex.Cr.App. 1990).

Nevertheless, the original appellate record in this cause does disclose that appellant is himself an African-American and that a sufficiently disproportionate number of black veniremembers were removed by peremptory challenge of the State as to make a prima facie case of racial discrimination in the jury selection process, contrary to the Fourteenth Amendment. Because Batson v. Kentucky, 476 U.S. 79 (1986), was not decided until after trial of this cause, we abated the appeal and remanded for an evidentiary hearing in the trial court on the ultimate question of intentional discrimination. Miller-El v. State, 748 S.W.2d 459 (Tex.Cr.App.

1988). See Griffith v. Kentucky, 479 U.S. 314 (1987). We have received the supplemental transcript and statement of facts from this hearing, including the trial judge's findings of fact and conclusions of law. Based upon our independent evaluation of the supplemented record, we are of the opinion that no error is shown.

With respect to each black veniremember against whom the State exercised a peremptory challenge, a racially neutral explanation, reasonably related to the trial of this case, was offered by prosecution witnesses. See Appendix A. Thus, it became appellant's burden to prove by a preponderance of the evidence that such explanations were untrue in fact and that one or more African-American veniremembers were indeed struck by the State on account of their race. Tompkins v. State, 774 S.W.2d 195, 201-202 (Tex.Cr.App. 1987).

We have carefully reviewed the voir dire examination of these prospective jurors and find ample support there for the prosecutor's racially neutral explanations. See Young v. State, 826 S.W.2d 141 (Tex.Cr.App. 1992). Accordingly, we do not believe that such explanations are patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law. Cf. Whitsey v. State, 796 S.W.2d 707, 720 (Tex.Cr.App. 1989)(opinion on rehearing). Accordingly, we do not find the trial judge's conclusion that no black veniremembers were intentionally excluded on account of their race to be clearly erroneous.

Appellant's first seven points of error are overruled.

II.

Appellant next complains that ten prospective jurors should have been excluded for cause on his motion, mainly because their attitudes about punishment were so harsh that they could not realistically consider the minimum penalty for murder or give fair effect to the presumption of innocence. See, e.g., Faulder v. State, 745 S.W.2d 327, 339 (Tex.Cr.App. 1987), and Homan v. State, 662 S.W.2d 372 (Tex.Cr.App. 1984), respectively.

The fact that a veniremember holds strictly retributive values

or advocates severe punishment for criminal offenders does not disqualify him from jury service in this state. Just as those opposed to capital punishment or inclined to leniency in general are legally qualified jurors, so also are those holding an opposite system of values. Neither kind of person is challengeable for cause unless he harbors a bias or prejudice against the law which is likely to prevent or substantially impair performance of his duties as a juror.

One who regards with disfavor the minimum penalty for a criminal offense is not necessarily suffering an objectionable impairment. See Williams v. State, 773 S.W.2d 525, 535-537 (Tex.Cr.App. 1988). So long as he is able to give the entire legal range of punishment due consideration, he is a fully capable juror under the laws of Texas. Cordova v. State, 733 S.W.2d 175, 184-185 (Tex.Cr.App. 1987). Likewise, those who express the accurate belief that indictees are officially suspected of wrongdoing do not thereby possess a fatal bias against the presumption of innocence unless they are also unwilling to base their conclusions about culpability entirely upon the evidence actually adduced in their presence at trial. See Mays v. State, 726 S.W.2d 937, 951 (Tex.Cr.App. 1986); Bell v. State, 724 S.W.2d 780, 797 (Tex.Cr.App. 1986).

We have carefully examined the complete voir dire examination of each veniremember whom appellant claims was challengeable for cause, whether for prejudice against the full range of punishment or bias against the presumption of innocence. As to each respective claim, we find credible assertions of willingness to obey instructions of the court with respect to all matters of law affecting jury deliberations and to consider the full range of punishment applicable to every potential offense in the case. See Appendix B. Consequently, appellant has not persuaded us that the trial judge erred by rejecting his challenge to any specified veniremember.

Points of error eight through sixteen, inclusive, are overruled.

III.

In his seventeenth point of error appellant claims that the trial judge erred in refusing to allow him additional peremptory challenges during the jury selection process.

By law, each side in a capital murder prosecution wherein the death penalty is a possible punishment is allowed to decline, without specific legal cause, the service of fifteen prospective jurors. Art. 35.15 (a), V.A.C.C.P. The law does not authorize more peremptory challenges than this except for the selection of alternate jurors. Art. 35.15 (d), V.A.C.C.P. The only other instance in which an additional challenge should be dispensed by the trial judge is where he has erroneously denied an earlier challenge for cause and the aggrieved party was thereby forced to use a peremptory strike against an objectionable juror. Demouchette v. State, 731 S.W.2d 75, 83 (Tex.Cr.App. 1986); Thomas v. State, 701 S.W.2d 653, 658 (Tex.Cr.App. 1985). In such case, however, the additional challenge merely restores a full complement of strikes to the offended party.

Because appellant did not demonstrate in Part II, ante, that he was forced to expend peremptory challenges against veniremembers who should have been removed for cause at his request, failure to allow him more peremptory challenges was not improper. Barney v. State, 698 S.W.2d 114, 124 (Tex.Cr.App. 1985); Von Byrd v. State, 569 S.W.2d 883, 892-893 (Tex.Cr.App. 1978).

Appellant's seventeenth point of error is overruled.

IV.

Points of error eighteen and nineteen pertain to two witnesses called by the defense who refused to testify at trial upon the ground that their testimony might incriminate them. Appellant sought "transactional immunity" for both, and here complains that the trial judge erroneously denied it. Arguing that the State is generally entitled to such immunity for prosecution witnesses under V.T.C.A., Penal Code, Section 71.04, appellant insists that ordinary principles of fairness secure him a like consideration.

But the statute to which he refers applies by its terms only to "an offense under this chapter[,]" meaning an offense under Chapter 71 of the Penal Code. Since appellant was not charged with such an offense in the instant prosecution, it does not appear that Section 71.04 is in control of his demand for witness immunity.

In any case, neither the statute, the constitutional right of compulsory process, nor the vital decisional law of this State assures an accused equal license to compel a grant of immunity for purposes of obtaining testimony otherwise subject to the privilege against self-incrimination. Autry v. Estelle, 706 F.2d 1394, 1400-1403 (5th Cir. 1983); United States v. Chagra, 669 F.2d 241, 258-261 (5th Cir. 1982); Moorhouse v. State, 614 S.W.2d 450, 453 n. 3 (Tex.Cr.App. 1981)(Clinton, J., concurring); Ross v. State, 486 S.W.2d 327, 328-329 (Tex.Cr.App. 1972). But see Norman v. State, 588 S.W.2d 340, 343-345 (Tex.Cr.App. 1979). Witnesses who possess the privilege are themselves only entitled to testimonial or use immunity under such circumstances. Kastigar v. United States, 406 U.S. 441 (1972); Ex parte Wilkinson, 641 S.W.2d 927, 929-930 (Tex.Cr.App. 1982); Ex parte Shorthouse, 640 S.W.2d 924 (Tex.Cr.App. 1982). Accordingly, appellant's demand of transactional immunity for his witnesses need not have been granted by the trial judge.

Points of error eighteen and nineteen are overruled.

V.

Appellant's wife, a coindictee, also invoked her privilege not to testify at trial. However, appellant claims that she waived the privilege by testifying outside the jury's presence as to her name, age, marital status, and whereabouts on a date pertinent to the instant prosecution. The trial judge agreed and held her in contempt for refusing to testify before the jury, but denied appellant's request to read a transcription of her earlier testimony to the jury instead. Because this transcription would have included statements made to the trial judge tending to create an alibi for appellant, he maintains it was error to exclude the

evidence.

We need not decide whether appellant's wife indeed waived her privilege not to testify, as the transcription of her earlier statements was never actually offered in evidence by appellant. But see Grayson v. State, 684 S.W.2d 691 (Tex.Cr.App. 1984). Although the State shared appellant's view at trial that her privilege had been waived, it evidently did not agree that her remarks to the trial judge should be read to the jury, since no objection was interposed by the prosecutor when the judge denied appellant's motion to do so. It thus seems that the trial judge anticipated an objection from the State and prospectively sustained it.

Ordinarily, we would be disinclined to condone such behavior. Parties are bound to make their own objections, and trial judges are usually expected to receive evidence against which no objection has been interposed. In this instance, however, appellant didn't attempt to offer his evidence in the usual way, as by calling a witness to his wife's declarations. As a consequence, counsel for the State wasn't afforded a fair ~~opportu~~nity to register his own objections, if any. Instead, appellant solicited prospective permission of the trial judge to have his wife's statements read to the jury by the court reporter. But because this testimony was not elicited in the jury's presence to begin with, reading it back before receiving it into evidence would have been improper. In short, appellant was obliged first to offer the evidence before complaining of its exclusion. Likewise, the State was not obliged to interpose an objection to evidence not actually tendered before the trier of fact. Under the present circumstances, therefore, we think it inappropriate to find error in the court's ruling.

Appellant's twentieth point of error is overruled.

VI.

In four points of error, appellant complains of the receipt into evidence of twenty-three color photographs depicting from various angles and at various distances the murder scene and body

of the deceased. He claims that these photographs were offered "solely to inflame the minds of the jury." Martin v. State, 475 S.W.2d 265, 267 (Tex.Cr.App. 1972). We have since recognized, however, that the admissibility of photographs with inflammatory potential is controlled by Texas Rule of Criminal Evidence 403, and have declared Martin defunct to the extent of any conflict. Long v. State, 823 S.W.2d 259, 271-272 (Tex.Cr.App. 1991). Still, the result in this case would be the same under either formulation.

We have examined the exhibits in question, and they do not impress us as unusually shocking or gruesome. Because appellant doesn't dispute their relevancy, we are unconvinced that the prejudice inherent in a visual representation of this dreadful crime necessarily outweighs as a matter of law its acknowledged probative value. Tex.R.Crim.Ev. 403; Rogers v. State, 774 S.W.2d 247, 258 (Tex.Cr.App. 1989); Williams v. State, 773 S.W.2d 525, 539 (Tex.Cr.App. 1988). Accordingly, the trial judge was within the ambit of his discretion to admit the photographs.

Appellant's points of error twenty-one through twenty-four, inclusive, are overruled.

VII.

Points twenty-five through thirty-four declare that appellant's arrest and the subsequent search of his automobile were unlawful, that the ordnance seized as a result should have been suppressed, and that color photographs of the car, the weapons, and the scene were likewise inadmissible. See U.S. Const., Amend. 4; Tex.Const. Art. 1, Sec. 9.

When investigation of the murder in this case cast suspicion on appellant, a warrant was issued for his arrest and for a search of his Irving residence. It was then discovered that he had gone to Houston and was residing with an acquaintance there. Accordingly, Dallas authorities advised Harris County by teletype that appellant was wanted on a murder warrant in Irving.

Based on this information, agents of the Houston Police Department (HPD) and of the United States Bureau of Alcohol,

Tobacco, and Firearms sought a search warrant for the residence of appellant's Houston acquaintance, including another warrant for appellant's arrest. While the site was surrounded, appellant and his friend arrived in a white Cadillac Seville. After depositing his companion and the latter's young children at the house, appellant noticed approaching law enforcement officers. Evidently in an attempt to escape, he backed from the driveway and spun the car quickly around, but his egress was blocked by a police vehicle. Brandishing a pistol, he sprang from the car, was shot by an HPD marksman and then arrested.

Appellant insists that his arrest was in fact made under authority of the Harris County warrant, which was invalid because issued only after he was actually taken into custody. But we need not pass upon validity of the Harris County warrant as Houston police officers were authorized to arrest appellant pursuant to the Dallas warrant of which they had been informed. The legality of their conduct in reliance on this warrant did not depend, as appellant mistakenly contends, upon their actual possession of the document. Art. 15.26, V.A.C.C.P.; Bradley v. State, 478 S.W.2d 527, 530 (Tex.Cr.App. 1972); Cook v. State, 470 S.W.2d 898, 899 (Tex.Cr.App. 1971). Rather, they were fully empowered to arrest him on notice of the outstanding warrant received electronically from Dallas law enforcement authorities. Cf. Art. 15.08, V.A.C.C.P. Any weapons and ammunition taken at that time from his person or from places in the immediate vicinity were, of course, seized pursuant to a lawful arrest and not subject to suppression on the grounds he now urges. New York v. Belton, 453 U.S. 454 (1981).

As for items obtained from within the Cadillac, especially weapons found in the trunk, the record reflects that the car was owned by appellant's companion, who voluntarily consented to its search by law enforcement officers. See United States v. Matlock, 415 U.S. 164 (1974); Sharp v. State, 707 S.W.2d 611, 617 (Tex.Cr.App. 1986); Williams v. State, 621 S.W.2d 609, 613 (Tex.Cr.App. 1981)(panel opinion). Cf. Bumper v. North Carolina,

391 U.S. 543 (1968).

Points of error twenty-five through thirty-four, inclusive, are overruled.

VIII.

Next, appellant maintains that the court's charge to the jury erroneously failed to restrict consideration of extraneous offenses to the limited purpose for which they were proven.

When evidence is received for a limited purpose the jury should, of course, be instructed as to the limitation, at least upon timely request of an affected party. Tex.R.Crim.Ev. 105 (a). Most often such limitation is sought because the evidence is relevant, not only to the issue for which it was received, but also to some other issue upon which it was not admissible and concerning which it might therefore be unfairly prejudicial. See Tex.R.Crim.Ev. 403. Proof of an extraneous offense is almost invariably admissible at the guilt/innocence phase of trial only insofar as it illuminates a material issue in the case. E.g., Crank v. State, 761 S.W.2d 328, 340-345 (Tex.Cr.App. 1988). It is never admissible merely to encourage the inference that an accused is likely to be guilty solely because he committed other crimes in the past. Tex.R.Crim.Ev. 404 (b). E.g., Williams v. State, 662 S.W.2d 344 (Tex.Cr.App. 1983).

In the instant cause the trial judge overruled appellant's objection to the admission of extraneous offenses without requiring the State to indicate the purpose for which it offered the evidence. Whether the judge erred in this respect, either by overruling appellant's objection or by failing to specify the limited purpose for which the evidence was received, is not a question upon which appellant has sought review in this Court. Rather, he complains only that the court's charge on extraneous offenses failed to limit the jury's consideration of such evidence to the purpose for which it was received.

Since it appears from the record that such evidence was in fact received, whether rightly or wrongly, for general purposes,

the jury was thus entitled to consider it upon any issue to which it was relevant, without limitation. Tex.R.Crim.Ev. 105 (a); Richardson v. State, 786 S.W.2d 335, 337-338 (Tex.Cr.App. 1990); Cantrell v. State, 731 S.W.2d 84, 94-95 (Tex.Cr.App. 1987). Accordingly, the trial judge did not err in overruling appellant's objection.

Point of error thirty-five is overruled.

IX.

Finally, appellant asserts that four prospective jurors were excluded for cause on motion of the State because of their opposition to capital punishment, in violation of the United States Constitution. Wainwright v. Witt, 469 U.S. 412 (1985); Adams v. Texas, 448 U.S. 38 (1980); Witherspoon v. Illinois, 391 U.S. 510 (1968). An examination of the record discloses that, while not all of these veniremembers were opposed to the death penalty in principle, all were opposed for reasons of conscience or religion to serving as jurors in a case where the death penalty might be assessed.

We have held that capital veniremembers, even if willing and able honestly to answer the special punishment issues, may be challenged for cause if they would opt to refuse the oath of a juror and thereby disqualify themselves from jury service on account of personal aversion to assessing the death penalty. Goodwin v. State, 799 S.W.2d 719, 733-734 (Tex.Cr.App. 1990); Ellis v. State, 726 S.W.2d 39, 41-44 (Tex.Cr.App. 1986). Cf. Felder v. State, 758 S.W.2d 760, 765-766 (Tex.Cr.App. 1988). Contra Hernandez, 757 S.W.2d at 753. The record in this cause rather clearly reflects that each of the prospective jurors whose exclusion is at issue here chose to exercise that option.

Appellant's thirty-sixth point of error is, therefore, overruled.

Finding no reversible error in the complaints assigned for review, we affirm appellant's conviction and sentence of death.

PER CURIAM

EN BANC

DELIVERED: September 16, 1992

DO NOT PUBLISH

Overstreet, J., concurs in the result

Clinton, J., dissents

Baird and Maloney, JJ, not participating

APPENDIX A

POINTS OF ERROR ONE THROUGH SEVEN:

Boseman: Venireman #7

State's justification for peremptory strike included the venireman's testimony regarding the death penalty and his possible hesitation in giving such a sentence. Support is found in the record where Boseman testified he agreed with the death penalty but could not serve on a capital murder jury (Voir Dire Vol. I-282). Also, he testified that if he felt that the defendant should not be executed, he could not answer the three punishment issues yes even though the evidence supported affirmative answers (Voir Dire Vol. I-300 through 301).

Fields: Venireman #9

State's justification for peremptory strike included the venireman's testimony regarding rehabilitation, religious beliefs, and the fact his brother had been convicted of a felony. Support is found in the record where Fields testified that the death penalty was only appropriate when a person could not be rehabilitated and it was his belief that anyone could be rehabilitated who found God (Voir Dire Vol. I-423). Also, Fields testified his religion's doctrinal views opposed the death penalty though this was not his personal opinion (Voir Dire Vol. I-404 through 405).

Warren: Venireman #28

Justification for the peremptory strike included Warren's misgivings about the death penalty (Supp. Hearing Vol. I-29 through 31). The record indicates that Warren had mixed feelings about the death penalty serving a purpose (Voir Dire Vol. III-1532). In addition, he did not agree with the death penalty in all cases (Voir Dire Vol. III-1526). The state also noted that the strike of Mr. Warren came at a time when they had numerous peremptory strikes remaining and could utilize them with less caution.

Rand: Venireman #37

State's justification for peremptory strike included Rand's

"today I say I can, but tomorrow I might not" (Voir Dire Vol. IV-2008).

Boggess: Venireman #40

State's justification for peremptory strike includes Boggess' reluctance to sit on a capital murder jury (reflected in record at Voir Dire Vol. IV-2008) as well as the fact she had been a defense witness for her nephew at one time.

Kennedy: Venireman 43

State's justification for peremptory strike included Kennedy's belief that in a capital murder case involving a normal robbery, the death penalty was inappropriate and that it is only appropriate in mass murder situations (Voir Dire Vol. 2176 through 2178).

Baker: Venireman 71

State's justification for peremptory strike involved Baker's dislike for the death penalty and her inability to sentence another human to death (Voir Dire Vol. VIII-2990 through 2991). The State also noted that her antagonistic attitude towards the prosecuting attorney was a factor.

APPENDIX B

POINTS OF ERROR EIGHT THROUGH SIXTEEN:

Weigant: Venireman #6

Defense objected to Weigant's views regarding the death penalty. Weigant testified that his personal view was the death penalty should be used for any intentional murder. However, he specifically stated he would follow the law and would not impose his personal view upon the defendant (Voir Dire Vol. I-204 through 205). Defense also questioned whether he was capable of assessing the minimum punishment for murder. In this regard, he specifically stated he would vote for the five year minimum if the facts of the case warranted it (Voir Dire Vol. I-247 through 249).

Jenkins: Venireman #21

Defense objected to Jenkins' inability to assess the minimum penalty in a murder case. However, Jenkins specifically stated that if the evidence proved that the minimum sentence was warranted, she would give that sentence (Voir Dire Vol. III-1126).

Smale: Venireman #24

Defense objected due to Smale's inability to give the minimum sentence for murder as well as her view that she would be unable to answer any of the three punishment related questions in the negative if the defendant were found guilty of capital murder. However, during questioning by the court, she specifically stated that she would assess the minimum penalty for murder if the evidence showed that it was appropriate (Voir Dire Vol. III-1324 through 2326). She also specifically stated that she could answer one or more of the punishment questions in the negative based upon the evidence and they were not automatic "yes" votes (Voir Dire Vol. III-1336 through 1337).

Nix: Venireman #48

Defense objected due to Nix's inability to consider the minimum punishment for murder. However, she specifically stated

that she would assess punishment at five years if she thought that it was appropriate based upon the evidence presented (Voir Dire Vol. V-2396).

Walters: Venireman #79

Defense objected due to Walters' belief that she would automatically answer yes to all three punishment questions if the defendant was found guilty of capital murder. However, under questioning from the court, Walters testified that the state would have to prove that the answers to the questions were yes; if they were not proven, then she would answer in the negative (Voir Dire Vol. VIII-3393 through 3394).

Davis: Venireman #82

Defense objected to Davis' inability to assess the minimum punishment for murder. However, Davis did specifically say she could vote for the minimum penalty of five years if the evidence warranted such a sentence though she had trouble imagining such a situation (Voir Dire Vol. IX-3496 through 3497).

Spence: Venireman #85

Defense objected to Spence because he presumed the defendant had done something wrong by virtue of his being tried for capital murder. In this regard, Spence testified that an indictment did not satisfy him beyond a reasonable doubt and that he would not consider the indictment as evidence against the defendant (Voir Dire Vol. IX-3567 through 3570). Defense also questioned Spence's ability to assess the minimum penalty for murder. Spence, however, specifically stated he would keep an open mind about punishment and would assess the minimum punishment if warranted (Voir Dire Vol. IX-3534 through 3535).

Jones: Venireman #103

Defense objected to Jones' inability to consider the minimum punishment for murder. Jones did testify that he believed the punishment for any murder should be mandatory death and that this would make it easier for him to assess the maximum rather than the minimum penalty. However, he specifically stated he would put these personal views behind him and would consider the minimum penalty if the evidence supported it. (Voir Dire Vol. XI-4217 through 4220).

O'Dell: Venireman #107

Defense objected to O'Dell due to his inability to consider the minimum penalty for murder. However, he specifically stated he could consider a punishment of five years for murder in the proper case and proper circumstances (Voir Dire Vol. XI-4511 throguh 4512).

Hearne: Venireman #108

Defense objected to Hearne's bias towards police officers, her bias against psychiatrists, and her testimony that she would change her opinion of guilt or innocence if she were the only dissenting vote on the jury. However, she testified she would not give more credibility to a police officer than any other witness (Voir Dire Vol. XI-4622). She also testified her objection to psychiatrists was only in her belief that there were certain things which could not be proven. She specifically stated she would believe a psychiatrist was telling the truth to the best of his ability (Voir Dire Vol. XI-4627 through 4628). Finally, when questioned by the court, Hearne testified she would change her opinion only if convinced by the other jurors that her initial position was incorrect (Voir Dire Vol. XI-4636).

No. 69,677

THOMAS JOE MILLER-EL
Appellant,

vs.

THE STATE OF TEXAS, Appellee

APPEAL FROM

DALLAS County

AFFIRMED

OPINION BY

PER CURIAM

Judge

EN BANC

DO NOT PUBLISH

Overstreet, J., concurs in the result

Clinton, J., dissents

Baird and Maloney JJ, not participating

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FILED

W85-78668-L(A)

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EX PARTE § CRIMINAL DISTRICT COURT

§

§ NUMBER FIVE

§

MILLER-EL, THOMAS JOE, § DALLAS COUNTY, TEXAS

Applicant §

DEPUTY

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Having considered the applicant's Application for Writ of Habeas Corpus, Respondent's Original Answer, applicant's Supplemental Application for Writ of Habeas Corpus, Respondent's Answer to applicant's Supplemental Application, Petitioner's Reply to Respondent's Answer to Supplemental Application, Motion to Strike Expert Witness Affidavit, Supplemental Motion for Evidentiary Hearing and Motion for Modification of Execution Date Pending Production of Trial Counsel's Files, personal recollections, official court documents and records, and exhibits tendered by counsel, the Court makes the following Findings of Fact and Conclusions of Law:

1. Applicant is confined pursuant to the judgment and sentence of this Court in cause no. F85-78668-L in which applicant was convicted by a jury of the offense of capital murder. the jury affirmatively answered the special issues submitted, so as to support imposition of a death sentence, and the court therefore assessed punishment at death, as required by law.

2. Counsel E. Bryce Cunningham and Royce West represented the applicant at trial in cause no. F85-78668-L.

3. During applicant's trial, the undersigned, the Honorable Pat McDowell was the presiding judge.

4. Counsel E. Bryce Cunningham and Royce West represented the applicant in his motion for new trial.

5. Applicant's motion for new trial was denied on June 18, 1986.

6. Counsel E. Bryce Cunningham represented the applicant on direct appeal.

7. The Court of Criminal Appeals, sitting en banc, affirmed the death sentence on direct appeal in an unpublished opinion delivered September 16, 1992.

8. On May 16, 1995, applicant filed a application for writ of habeas corpus, cause no. W85-78668-L, in this Court.

9. Applicant's counsel on his application for writ of habeas corpus is Ruth Kollman.

10. Applicant has raised thirteen issues in this application for writ of habeas corpus:

a. whether putting applicant to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound, major surgery, pneumonia, and infections violated his due process right to a fair trial guaranteed by the Fifth and Fourteen Amendments of the United States Constitution;

b. whether putting applicant to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound, major surgery, pneumonia, and infections violated his due course of law rights to a fair trial guaranteed by article 1, § 13 and article 1, § 19 of the Texas Constitution;

c. whether putting applicant to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound, major surgery, and pneumonia violated his due process right to a fair trial because he was effectively not present during critical portions of his trial;

d. whether putting applicant to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound, major surgery, and pneumonia violated his due course of law right to a fair trial because he was effectively not present during critical portions of his trial;

e. whether the trial court violated applicant's due process rights by failing to conduct a hearing to determine the nature and extent of applicant's physical condition and to obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense;

f. whether the trial court violated applicant's due course of law rights by failing to conduct a hearing to determine the nature and extent of applicant's physical condition and to

obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense;

g. whether the trial court violated applicant's due process rights by failing to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication;

h. whether the trial court violated applicant's due course of law rights by failing to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication;

i. whether the trial court violated applicant's due process rights under the Fifth and Fourteenth Amendments and his right to compulsory process under the Sixth Amendment of the United States Constitution in preventing him from presenting his alibi defense by denying his oral motion for continuance during the course of the trial;

j. whether the trial court violated applicant's due course of law rights under article 1, §§ 13 and 19 and his right to compulsory process under article 1, § 10 of the Texas Constitution in preventing him from presenting his alibi defense by denying his oral motion for continuance during the course of the trial;

k. whether the State fundamentally violated applicant's due process rights by impermissibly and unnecessarily interjecting applicant's religious affiliation into the proceedings so as to inflame and prejudice the jury against applicant on racial and religious grounds;

l. whether the State fundamentally violated applicant's due course of law rights by impermissibly and unnecessarily interjecting applicant's religious affiliation into the

proceedings so as to inflame and prejudice the jury against applicant on racial and religious grounds; and

m. whether applicant received ineffective assistance of both trial and appellate counsel in violation of his rights under the Sixth Amendment of the United States Constitution.

11. On December 11, 1995, the State of Texas filed its Original Answer.

12. This Court finds that December 11, 1995, Barbara Stacy, Custodian of Records of the Dallas County Jail, notified Jennifer Balido, Assistant District Attorney for Dallas County, that the jail records for applicant had been located. This Court finds that the delay in the location of applicant's jail records was due to a misfiling, and therefore was not an intentional act by agents of the State to deny applicant access to these records.

13. On December 14, 1995, the Honorable Manny Alvarez, Presiding Judge of Criminal District Court Number Five, Dallas County, Texas signed an "Order Modifying Execution Date", finding that additional time was needed to review the medical records and file any additional briefs. The Court ordered that applicant's supplemental application concerning the newly discovered medical records be filed no later than the 15th day of February, 1996. The Court further ordered that the State would file its response, if any, no later than March 15, 1996. The Court further ordered that all supplemental filings concerning this matter from either party be filed no later than 30th day of March, 1996.

14. On February 15, 1996, applicant filed his "Supplemental Petition and Supporting Brief for Post-Conviction Writ of Habeas Corpus and Request for Evidentiary Hearing".

15. On March 15, 1996, Respondent filed its "Answer to Applicant's Supplemental Application for Writ of Habeas Corpus".

16. On March 29, 1996, applicant filed his "Petitioner's Reply to Respondent's Answer to Supplemental Petition, Motion to Strike Expert Witness Affidavit, Supplemental Motion for Evidentiary Hearing and Motion for Modification of Execution Date Pending Production of Trial Counsel's Files".

17. The Court finds that during all stages of his capital murder trial, applicant had the capacity to understand the nature and object of the proceedings against him, he consulted with counsel, and he assisted in preparing his defense. Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 903, 43 L.Ed.2d 103, 113 (1975). This Court finds, based on the personal recollection of the trial court, the exhibits submitted by applicant and respondent, and the credible assertions in the affidavit of Steven Bowers, M.D., that the applicant has failed to prove by a preponderance of the evidence that he did not have the capacity to understand the nature and object of the proceedings against him, that he did not consult with his trial counsel, or that he did not assist in preparing his defense.

18. This Court finds, based on the personal recollection of the trial court and review of the trial record and the chronology prepared by respondent, that applicant had the present ability at trial to consult with his lawyer with a reasonable degree of rational understanding and that he had a rational as well as factual understanding of the proceedings against him. Dusky v. Unites States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

19. This Court finds, based on the personal recollection of the trial court and review of the trial record, the chronology prepared by respondent, and the credible assertions in Dr. Stephen Bowers' affidavit, that applicant was competent not only while he was on pain medication, but also when he was not on pain medication.

20. This Court finds that the trial court did not deny applicant his due process rights by ignoring evidence that indicated that applicant might not be competent. Cf. Lafferty v. Cook, 949 F.2d at 1550. This Court finds that, at the time of the trial, no evidence existed of applicant's alleged incompetency. This Court reaffirms its finding at the time of the trial that applicant was competent and had actively assisted in his defense. (R.XVII:1198). This Court further finds that applicant has presented this Court nothing to show that any evidence presently exists of applicant's alleged incompetency. This Court finds that the record supports the fact that there was no "bona fide doubt" as to applicant's competence to stand trial, and therefore the trial court was not required to conduct a separate hearing sua sponte. Ex parte Danny Dean Thomas a.k.a. Shozdijiji Shisinday, (Tex. Crim. App. no. 71929, June 7, 1995) 1995 WL 335764 at 2, citing Drope v. Missouri, 420 U.S. 162, 173, 95 S.Ct. 896, 904, 43 L.Ed.2d 103

(1975), Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 839, 842, 15 L.Ed.2d 815; Ex parte Johnston, 587 S.W.2d 163, 165 (Tex. Crim. App. 1979).

21. This Court finds that trial counsel for applicant assured the trial court that their client was indeed competent and aware of the facts and what was going on in the trial. (R.XVII:1198). This Court additionally finds that nothing prohibited applicant from requesting applying for a subpoena for the records of his trial counsel before the application requested on March 29, 1996. This Court, therefore, overrules as untimely applicant's motion for modification of the execution date to subpoena the files of his trial counsel.

22. This Court finds that applicant's motion for modification of the execution date to subpoena the files of his trial counsel is made not in the interest of justice, but to delay this Court's action on his pending application for habeas corpus relief.

23. This Court concludes as a matter of law that since competency is a fact question, the trial court's competency determination is presumed to be correct since applicant has failed to support his allegations of incompetence with instances in the record. Lafferty v. Cook, 949 F.2d at 1550.

24. This Court concludes as a matter of law that since the trial record, applicant's medical records, and the court's own personal recollections support that there was no bona fide doubt as to applicant's competence to stand trial, the trial court was not required to conduct a

separate hearing sua sponte. Ex parte Danny Dean Thomas a.k.a. Shozdijiji Shisinday, (Tex. Crim. App. no. 71929, June 7, 1995) 1995 WL 335764 at 2, citing Drope v. Missouri, 420 U.S. 162, 173, 95 S.Ct. 896, 904, 43 L.Ed.2d 103 (1975), Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 839, 842, 15 L.Ed.2d 815; Ex parte Johnston, 587 S.W.2d 163, 165 (Tex. Crim. App. 1979).

25. This Court finds that applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 of the Texas Constitution should be accorded a more generous interpretation of applicant's competence to stand trial under the facts of this case than their federal counterparts. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex.

Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

26. This Court finds that applicant has failed to show how the **facts of this case, state precedent on this issue, and state policy considerations** compel this court to even consider his argument that the state constitution affords him greater protection regarding his competency to stand trial than the federal constitution.

27. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections regarding applicant's competence to stand trial than its federal counterpart.

28. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding applicant's competency to stand trial.

29. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, broader protection regarding applicant's competency to stand trial than its federal counterpart.

30. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, broader protection regarding applicant's competency to stand trial than their federal counterparts.

31. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this court to independently interpret the Texas Constitution and to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, more protection than the Fourteenth and Fifth Amendments regarding applicant's competency to stand trial.

32. This Court finds that, assuming applicant has not waived his Texas Constitutional ground for relief, and if applicant has proved that the Texas Constitution provides broader

protections than its federal counterpart, applicant has failed to prove that the trial court violated his due course of law rights under the Texas Constitution by putting him to trial without conducting a hearing to determine the nature and extent of his physical condition and its alleged affect on his ability to withstand the rigors of trial and effectively assist in his own defense. The Court concludes as a matter of law that applicant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence. Tex. Code Crim. Proc. Ann. art. 46.02, § 1(b) (Vernon 1994). This Court concludes as a matter of law that the standard to be applied here is that a person is incompetent to stand trial if he does not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against him. Tex. Code Crim. Proc. Ann. art. 46.02, § 1(a) (Vernon 1994).

33. Although if during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court would have been required to conduct a hearing to determine whether or not there is evidence to support a finding of incompetency to stand trial, Tex. Code Crim. Proc. Ann. art. 46.02, § 2(b) (Vernon 1994), this Court finds that applicant has failed to prove by a preponderance of the evidence that the trial court received evidence from any source such that a "bona fide doubt" as to applicant's competency was raised under Tex. Code Crim. Proc. Ann. art. 46.02, § 2(b) (Vernon 1994). This Court therefore finds that applicant has failed to prove by a preponderance of the evidence that the trial court erred in not conducting a hearing to determine the competency of applicant.

34. This Court finds that applicant has failed to prove by a preponderance of the evidence that his physical condition denied him a fair trial under the United States Constitution by rendering him not "effectively present" during critical portions of his trial. Applicant cites two cases in support of his contention: Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934) and Adanandus v. State, 866 S.W.2d 210 (Tex. Crim. App. 1993). This Court concludes as a matter of law that both Snyder and Adanandus address issues surrounding the **physical absence** of an accused during critical portions of his trial, and applicant has failed to show this Court how these cases address mental or physical incapacity as a basis for a claim of not being effectively "present" during trial. Applicant fails to cite any additional authority to support his contention that putting him to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound rendered him "not effectively present" during his trial.

35. This Court finds that even if applicant had cited applicable case law, applicant has failed to prove by a preponderance of the evidence that his physical condition rendered him not "effectively present" during his trial. This Court finds, based on personal recollections of the trial court and review of the trial record, that applicant had an understanding of the trial process and what was going on in the courtroom.

36. This Court finds that applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 of the Texas Constitution should be accorded a more generous interpretation of applicant's "effective presence" during his trial under

the facts of this case than their federal counterparts. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

37. This Court finds that applicant has failed to show how the **facts of this case, state precedent on this issue, and state policy considerations** compel this Court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding his "effective presence" during his trial. This Court concludes as a matter

of law that applicant's reliance on Ex parte Johnson, 587 S.W.2d 163, 166 (Tex. Crim. App. 1979) in support of his contention is misplaced.

38. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections regarding applicant's "effective presence" during his trial than its federal counterpart.

39. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding applicant's "effective presence" during his trial.

40. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, that the Texas Constitution provides broader protection than its federal counterpart regarding applicant's "effective presence" during his trial.

41. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and find, under the facts of this case, that the Texas Constitution provides broader protection than its federal counterparts regarding applicant's "effective presence" during his trial.

42. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this Court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, more protection than the Fourteenth and Fifth Amendments regarding applicant's "effective presence" during his trial.

43. In his fifth ground for relief, applicant contends that he was denied due process of law in that the trial court did not conduct a hearing to determine the nature and extent of applicant's physical condition and to obtain expert testimony about applicant's physical ability to withstand the rigors of trial and to effectively assist in his own defense, but he relies upon authority regarding the **competency** of the accused and the trial court's duty to investigate that competency. The Court therefore concludes as a matter of law that the ground is inadequately briefed and will not consider it.

44. This Court finds that, if applicant had adequately briefed the issue regarding the trial court's failure to conduct a hearing to determine the nature and extent of applicant's physical condition and to obtain expert testimony about applicant's physical ability to withstand the rigors of trial and assist in his own defense, applicant has failed to prove by a preponderance of the evidence that his physical condition warranted a hearing by the trial court.

45. This Court finds, based on the recollection of the trial court and supported by the trial record, that whenever applicant communicated to the trial court, through his trial counsel, that he was unable to physically continue, the trial court would stop the trial until applicant was able to continue. (See, e.g., R.XVII:1294-1296 and 1434, where the trial court informs the jury that the attorneys are prepared to work into the late evening to finish their presentation of evidence in the punishment phase of the trial, but the trial court recesses the jury early after applicant's trial counsel states, "Mr. Miller-El has indicated---off the record.").

46. In his sixth ground for relief, applicant cites authority that contends that he was denied his due course of law rights under the Texas Constitution in that the trial court did not conduct a hearing to determine the nature and extent of applicant's physical condition and to obtain expert testimony about applicant's ability to withstand the rigors of trial and effectively assist in his own defense, but he does not offer any additional argument or authority to support his contention. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate

issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

47. This Court finds that applicant has failed to show how the facts of this case, state precedent on this issue, and state policy considerations compel this court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical ability withstand the rigors of trial and effectively assist in his own defense.

48. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure**

of the Texas Constitution compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections than its federal counterpart regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense.

49. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense.

50. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, the Texas Constitution provides broader protection than its federal counterpart regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to

obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense.

51. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, the Texas Constitution provides broader protection than its federal counterpart regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense.

52. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, additional protection than the Fourteenth and Fifth Amendments regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical condition withstand the rigors of trial and effectively assist in his own defense.

53. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, and if applicant has proved that the Texas Constitution provides broader protections than its federal counterpart, applicant has still failed to prove by a preponderance of the evidence that the trial court violated his due course of law rights under the Texas Constitution by putting him to trial without conducting a hearing to determine the nature and extent of his physical condition and its alleged affect on his ability to withstand the rigors of trial and effectively assist in his own defense.

54. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied to his right to due process when the trial court did not conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was **forcibly** medicated, and absent such a showing, this Court concludes as a matter of law that applicant's reliance on Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) is misplaced. Ex parte Danny Dean Thomas a.k.a. Shozdijiji Shisinday, 1995 WL 335764 at 2.

55. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was under the influence of an anti-psychotic medication during his trial. Applicant has failed to argue any authority to compel this Court to extend the holding of the United States Supreme Court in Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), to include types of medication other than antipsychotic medication. Absent such a

showing, this Court concludes as a matter of law that applicant's reliance on Riggins v. Nevada is misplaced. See Riggins v. Nevada, 504 U.S. at ___, 112 S.Ct. at 1816, 118 L.Ed.2d at ___.

56. This Court finds that, even if Riggins v. Nevada would apply, applicant has failed to prove by a preponderance of the evidence that the trial court erred in not conducting a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication. The Court further finds that based on the credible assertions of Dr. Adrian Collyns in his letter to the trial court dated February 24, 1986 and in his affidavit, that applicant did not require any pain medication to attend court after his prescription for pain medication ran out.

57. Applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 of the Texas Constitution should be accorded a more generous interpretation than their federal counterparts regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication under the facts of this case than their federal counterparts. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority

to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

58. This Court finds that applicant has failed to show how **the facts of this case, state precedent on this issue, and state policy considerations** compel this court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

59. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections than the federal constitution regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

60. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

61. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find in it, under the facts of this case, broader protection than in its federal counterpart regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

62. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and find in them, under the facts of this case, broader protection than in their federal counterparts regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

63. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, additional protection than the Fourteenth and Fifth Amendments regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

64. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied due process of law when the trial court prevented him from presenting his alibi defense by denying his oral motion for continuance during trial. This Court finds that applicant failed to comply with the Texas Code of Criminal Procedure, which provides that a criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown, Tex. Code Crim. Proc. Ann. art. 29.03 (1994), and which requires that the motion must be sworn to by a person having personal knowledge of the facts relied on for the continuance. Tex. Code Crim. Proc. Ann. art. 29.08 (1994). This Court also finds that applicant has failed show this Court any reason why his failure to comply with the statutory requirements for a continuance should be overlooked by this Court.

65. This Court finds that even though applicant failed to comply with the statutory requirements for a continuance after the trial had begun, the trial court considered applicant's

motion for continuance on its merits, and denied the motion. (R.XVII:1121, 1166). This Court finds that applicant has failed to prove by a preponderance of the evidence that his right to due process of law was violated by the trial court's consideration and denial of his motion for continuance.

66. This Court finds that applicant has failed prove by a preponderance of the evidence that the trial court abused its discretion in overruling applicant's oral motion for continuance during the trial.

67. This Court finds that applicant has failed to prove by a preponderance of the evidence not only that the denial of the continuance was an abuse of discretion of the trial court but also "so arbitrary and fundamentally unfair" that it denied him due process and rendered his trial fundamentally unfair. McFadden v. Cabana, 851 F.2d 784 (5th Cir. 1988), citing Hicks V. Wainright, 633 F.2d 1146, 1148 (5th Cir. 1981); Kirkpatrick v. Blackburn, 777 F.2d 272, 279 (5th Cir. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d (1986)(citing United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985)).

68. This Court finds that applicant has failed to prove by a preponderance of the evidence the probability of procuring the testimony of his co-defendant wife within a reasonable time in his attempt to establish that the trial court abused its discretion in denying applicant's motion for continuance. This Court finds that Dorothy Miller-El pled "nolo contendere" to the charges of Murder and Attempted Capital Murder on August 27, 1992, almost six years after

her husband's motion for continuance. The Court concludes as a matter of law that this delay is not a "reasonable time" for procurement of testimony as a basis for applicant's motion for continuance under Hicks v. Wainright, 633 F.2d at 1149.

69. This Court finds that applicant has failed to prove by a preponderance of the evidence that the testimony of his co-defendant wife would have been of such weight and believability so as to influence the decision of the jury. See Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970). This Court finds that, based on the overwhelming weight of the evidence against applicant, including the credible assertions of the eye-witness to the robbery-murder and considering the affidavit of applicant's wife, Dorothy Miller-El, it would be mere speculation to conclude that the proposed testimony by applicant's co-defendant wife would have been of such weight and believability as to influence the decision of a jury. See Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970).

70. Applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 and the right to compulsory process in art. 1, § 10 of the Texas Constitution should be accorded a more generous interpretation than their federal counterparts under the facts of this case regarding the trial court's denial of applicant's motion for continuance. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue

separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

71. This Court finds that applicant has failed to show how **the facts of this case, state precedent on this issue, and state policy considerations** compel this court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding the trial court's denial of his motion for continuance.

72. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections than its federal counterpart regarding the trial court's denial of his motion for continuance.

73. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding the trial court's denial of his motion for continuance.

74. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, that the Texas Constitution provides broader protection than its federal counterpart regarding the trial court's denial of his motion for continuance.

75. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, that the Texas Constitution provides broader protection than its federal counterpart regarding the trial court's denial of his motion for continuance.

76. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of**

the Texas Constitution, when combined with art. 1, §§ 13 and 19, compels this court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, additional protection than the Fourteenth and Fifth Amendments regarding the trial court's denial of his motion for continuance.

77. This Court finds that applicant has failed to prove by a preponderance of the evidence why the procedural requirements for a motion for continuance under Tex. Code Crim. Proc. Ann., Chapter 29, should not apply to his oral motion for continuance in this case. The Court also finds that applicant has failed to prove by a preponderance of the evidence that he was surprised when his co-defendant wife invoked her fifth amendment privilege not to testify.

78. This Court finds that based on the statement of applicant's trial counsel during trial a week before actually calling defendant's wife to the stand that it was his understanding that applicant's wife would invoke her fifth amendment privilege not to testify, that applicant was not surprised by his wife's actions. This Court further finds that applicant has failed to prove by a preponderance of the evidence that his wife's invocation of her fifth amendment right not to testify was such an unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant was so taken by surprise that a fair trial could not be had. Tex. Code Crim. Proc. Ann. art. 29.13 (Vernon 1994).

79. This Court concludes as a matter of law that motions for continuance are addressed to the court's discretion. Tex. Code Crim. Proc. Ann. art. 29.06 (Vernon 1994). This Court further concludes as a matter of law that equitable motions for continuance made during trial are reviewable as well under an abuse of discretion standard. Vega v. State, 898 S.W.2d 359, 361 (Tex. App. -- San Antonio 1995, no pet.); Darty v. State, 149 Tex. Crim 256, 193 S.W.2d 195 (1946); Daigle v. State, 658 S.W.2d 774 (Tex. App. -- Beaumont 1983, no pet.). This Court finds that applicant has failed to prove by a preponderance of the evidence that the trial court abused its discretion in denying applicant's oral motion for continuance, whether the motion is considered statutory or equitable.

80. This Court concludes as a matter of law that O'Rarden v. State, 777 S.W.2d 455 (Tex. App.--Dallas, 1989, pet. ref'd) is distinguishable from the instant case. This Court finds that applicant's argument that a "surprise" motion for continuance during trial need not comply with the procedural requirements because the testimony from the witness stand or representations of counsel provide the basis of the motion belies the factual situation in the instant case. This Court finds, based on personal recollection of the trial court and a review of the trial record, at **no time** did applicant's trial counsel contend that anyone on the defense team was surprised when applicant's wife invoked her fifth amendment privilege. The Court additionally finds that applicant's trial counsel simply asked for a continuance until the wife's related cases were complete and she no longer needed the protection of the Fifth Amendment. The Court further finds applicant's trial counsel had acknowledged more than a week earlier that applicant's wife

would indeed invoke her right not to testify. The Court finds that applicant has failed to prove by a preponderance of the evidence that any exigency or "surprise" existed.

81. . This Court finds that, while in his instant application for habeas corpus relief applicant tries to circumvent the requirements of chapter 29 of the Code of Criminal Procedure in this application by claiming he was surprised by his wife's actions at the time of his trial, the motion for continuance was based on his wife being unavailable to testify. This Court finds (and applicant concedes in his application) that an "absent witness" motion for continuance must satisfy the requirements of the Code of Criminal Procedure. Lewis v. State, 664 S.W.2d 345. 349 (Tex. Crim. App. 1984); Ramirez v. State, 842 S.W.2d 796, 800 (Tex. App.--El Paso 1992, no pet.); Coons v. State, 758 S.W.2d 330, 335 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd).

82. The Court finds that applicant has failed to prove by a preponderance of the evidence that justice would have been better served by the trial court continuing applicant's trial for six years so that his wife could dispose of her own related criminal charges and testify in his behalf. The Court further finds that no justice would have been served in delaying applicant's trial until some unforeseeable date in the future. Williams v. State, 625 S.W.2d 769 (Houston [14th Dist.] 1981, no pet.). The Court finds that only after August 27, 1992, when applicant's wife pled "nolo contendere" to the charges of Murder and Attempted Capital murder, would Dorothy Miller-El have been available to testify.

83. This Court finds that even if applicant had proved that the trial court abused its discretion in denying his motion for continuance, applicant has failed to prove by a preponderance of the evidence that a reasonable probability exists that the verdict might have been different had the trial been properly conducted. Schrader v. Whitley, 904 F.2d 282, 288 (5th Cir. 1990).

84. This Court finds that applicant has failed to prove by a preponderance of the evidence how the potential prejudice, if any, of evidence of the group affiliation of applicant outweighed its probative value in proving the identity of applicant as the person who committed this capital murder. This Court finds that the jury was entitled to know about applicant's prior visit to the scene of the murder and the circumstances surrounding it. See Beasley v. State, 902 S.W.2d 452 (Tex. Crim. App. 1995). This Court finds that eyewitness Donald Hall's identification of applicant and other members of the religious organization as the group that robbed the hotel and killed Douglas Walker was based on his seeing them at the Holiday Inn two weeks prior when the group celebrated the Moorish Temple Feast, and thus applicant's affiliation with this religious group was relevant.

85. This Court finds that applicant has failed to prove how his due process rights were violated by the trial court admitting evidence of his group affiliation. This Court finds that applicant has failed to prove how the admission of this evidence inflamed or prejudiced the jury against applicant on racial or religious grounds. This Court finds that the applicant has failed to point to any instance in the record where the State put on any evidence regarding the

philosophy, religious beliefs, or practices of the group. This Court further finds that applicant has failed to cite to any instance in the record where the State's attorneys or witnesses criticized or degraded the organization or implied to the jury that the defendant was more or less guilty because of his affiliation with the group.

86. Applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 of the Texas Constitution should be accorded a more generous interpretation of applicant's group affiliation under the facts of this case than their federal counterparts. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State,

782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

87. This Court finds that applicant has failed to show how **the facts of this case, state precedent on this issue, and state policy considerations** compel this court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding his group affiliation.

88. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections than its federal counterpart regarding applicant's group affiliation.

89. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, broader protection of individual rights regarding applicant's group affiliation.

90. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical**

context of the Texas Constitution compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, the Texas Constitution provides broader protection than its federal counterpart regarding applicant's group affiliation.

91. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and find, under the facts of this case, the Texas Constitution provides broader protection than its federal counterpart regarding applicant's group affiliation.

92. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, more protection than the Fourteenth and Fifth Amendments regarding applicant's group affiliation.

93. This Court finds that applicant has failed to prove by a preponderance of the evidence that he received ineffective assistance when his trial counsel did not raise the issue of his competency at trial or seek a continuance until his physical condition improved to a point he

would be competent. This Court finds that applicant has failed to prove that he received ineffective assistance when his trial counsel did not request a competency hearing. This Court finds that the record does not reveal any evidence that would raise a "bona fide doubt" as to the competency of applicant during his trial. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Tex. Code Crim. Proc. Ann. art. 46.02 §2(b) (Vernon 1979).

94. This Court finds that nothing in the trial record, the trial court's file, the medical records from the two hospitals that treated applicant, or applicant's records from the Dallas County Jail proves by a preponderance of the evidence that applicant received ineffective assistance when his trial counsel did not raise the issue of his competency at trial, did not request a competency hearing, and did not seek a continuance until his physical condition improved.

95. This Court finds that applicant has failed to prove by a preponderance of the evidence that applicant received ineffective assistance when his trial counsel did not request a hearing to determine the necessity of continuing or discontinuing applicant's medication. This Court also finds that applicant has failed to cite any relevant authority that the actions of his trial counsel in not requesting a hearing to determine the necessity of continuing or discontinuing applicant's medication should be considered such a serious error that his trial counsel were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the

defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the errors. Strickland v. Washington, 466 U.S. at 694.

96. This Court finds that applicant has failed to prove by a preponderance of the evidence that applicant received ineffective assistance when his trial counsel did not adhere to the statutory requirements of Tex. Code Crim. Proc. Ann., Chapter 29, in making applicant's motion for continuance. This Court finds that applicant has failed to prove how he was prejudiced by the actions of his trial counsel when the trial court considered the merits of the motion even though the oral motion for continuance did not adhere to the statutory requirements of Tex. Code Crim. Proc. Ann., Chapter 29.

97. This Court also finds that applicant has failed to prove by a preponderance of the evidence that when his trial counsel did not adhere to the statutory requirements of Tex. Code Crim. Proc. Ann., Chapter 29, his trial counsel committed such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that

applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the errors. Strickland v. Washington, 466 U.S. at 694.

98. This Court finds that applicant's inclusion of his contention that he received ineffective assistance from his trial counsel when they failed to introduce into evidence the testimony of his applicant's co-defendant wife as a statement of an unavailable witness in the same ground for relief as his ineffective assistance claim regarding his counsel not making a motion for continuance renders this ground as multifarious and presents nothing for this Court for review. Tex. R. App. P. 74(d); County v. State, 821 S.W.2d 303, 308 (Tex. Crim. App. 1989).

99. This Court finds that, if applicant has properly preserved his contention that his trial counsel were ineffective when they did not offer the testimony of applicant's co-defendant wife as a statement of an unavailable witness, applicant has failed to prove by a preponderance of the evidence that their inaction constituted such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional

errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694, especially in light of the fact that applicant's wife was, at the time of trial, under criminal indictment for her role in this same robbery-murder.

100. This Court finds that the applicant has failed to prove by a preponderance of the evidence that the testimony of the applicant's co-defendant wife was admissible as a statement of an unavailable witness. This Court concludes as a matter of law that under Tex. R. Crim. Evid. 804(b)(1), testimony given by an unavailable declarant as a witness at another hearing of the same or a different proceeding will not be excluded under the hearsay rule **if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination**. This Court finds that in this situation, the State did not have an opportunity to examine applicant's wife during the hearing where she attempted to invoke her Fifth Amendment not to testify and thus did not have the opportunity to develop the testimony by cross examination. This Court therefore concludes as a matter of law that the statement of applicant's codefendant wife would be excluded under the hearsay rule.

101. This Court finds that applicant has failed to prove by a preponderance of the evidence that the hearing testimony of the applicant's co-defendant wife was admissible at all. This Court finds that the testimony of applicant's wife as to the location of her husband during

the robbery/murder was not responsive to the question asked by the trial court. (R.XVII:1078). This Court finds that applicant's wife's non-responsive answer was not admissible as evidence.

102. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was not afforded effective assistance when his trial counsel did not object to the admission of, or alternatively seek a limiting instruction for, evidence of extraneous offenses. This Court finds that applicant has failed to prove by a preponderance of the evidence that his trial counsel's inaction constituted such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

103. This Court finds that applicant, in support of his contention that he did not receive effective assistance when his trial counsel did not object to the admission of, or alternatively seek a limiting instruction for, evidence of extraneous offenses, has only cited to one portion of the trial record which contains testimony that was heard outside the presence of the jury. (See R.XV:310). This Court finds that, without other specific citations to the record demonstrating

where extraneous acts were heard by the jury, applicant has failed to adequately brief this issue for this Court's review. This Court further finds that, without other citations to the record that demonstrate where extraneous acts were considered by the jury, applicant has failed to prove by a preponderance of the evidence that he was harmed by the admission of extraneous offenses.

104. This Court finds that, even if the issue is adequately briefed for consideration by this Court, applicant has failed to prove by a preponderance of the evidence that the extraneous offenses he complains of in his application were not "circumstances of the offense" and thus relevant to proving applicant's identity as the person who committed the capital murder. This Court finds that the complained-of testimony concerned the facts surrounding the arrest of applicant in Houston, including charges against applicant for evading arrest and the unlawful carrying of a weapon. The Court finds that a Houston police officer testified that applicant, in an attempt to escape the approaching law enforcement officers, quickly spun around the car that he was driving but was stopped by a police vehicle blocking his way. Miller-El v. State, no. 69,677 at 8. This Court finds that the Houston police officer testified that applicant, sprang from the car, brandishing a pistol, and was shot by an Houston Police Department marksman and then arrested. Miller-El v. State, no. 69,677 at 8; (R.XV:316). This Court also finds that the evidence in the trial established that one of the two guns applicant carried at the time of his arrest was the murder weapon. (R.XV:933).

105. This Court finds that applicant has failed to rebut the presumption that his trial counsel, in not objecting to the admission of, or alternatively seeking a limiting instruction for,

evidence of extraneous offenses, were exercising sound trial strategy. Jackson v. State, 877 S.W.2d at 771. This Court also finds that applicant has failed to overcome the presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment. Delrio v. State, 840 S.W.2d 724 (Tex. Crim. App. 1992). This Court finds that applicant's trial counsel, while cross-examining the Houston police officer in a hearing outside the presence of the jury regarding the arrest and search, elicited testimony that the actual owner of the vehicle applicant was driving, John Hicks, had been in the vehicle moments before applicant's arrest. (R.XV:331). The Court finds that the Houston police officer also testified, under cross-examination by applicant's trial counsel, that Hicks was also the owner of the house that was searched pursuant to a search warrant, where other evidence linked to the robbery/murder was found. (R.XV:333). The Court further finds that applicant's trial counsel, in cross-examining the Houston police officer, succeeded in having the officer admit that applicant had no connection with the house searched (R.XV:335) and, other than being in the car at the time it was stopped, no connection with the car (R.XV:337). The Court finds that applicant's trial counsel later argued in closing argument that the items found in the car and the house, attributed to applicant, did not in fact belong to applicant, but to John Hicks, the owner of the car and the Houston residence. (R.XVII:1240-1242). This Court therefore finds that applicant's trial counsel exercised sound trial strategy in arguing that the evidence could not be linked to applicant.

106. This Court finds that applicant has failed to prove by a preponderance of the evidence that he did not receive effective assistance when his trial counsel did not request a limiting jury instruction in substantially correct form regarding evidence of extraneous offenses.

The Court finds that applicant has failed to prove that his trial counsel's actions constituted such a serious error that they were not functioning effectively as counsel, in light of the trial court's instruction to applicant's trial counsel to make their objections orally as if they were in writing. (R.XVII:1201). Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

107. The Court finds that applicant has failed to prove by a preponderance of the evidence why the jury was not entitled to consider the evidence of extraneous offenses upon any issue to which it was relevant, without limitation, when the evidence was admitted into evidence for general purposes (explained by the trial court as "circumstances of the offense"). Miller-El v. State (Tex. Crim. App. no. 69,677, September 16, 1992) at 10, citing Richardson v. State, 786 S.W.2d 335, 337-338 (Tex. Crim. App. 1990); Cantrell v. State, 731 S.W.2d 84, 94-95 (Tex. Crim. App. 1987).

108. This Court concludes as a matter of law that, because the Court of Criminal Appeals has previously held that the extraneous offenses admitted in this case were admitted for

the jury's unlimited consideration and that a limiting instruction was therefore not required, applicant's trial counsel could not be ineffective for failing to request such an instruction. See Camacho v. State, 864 S.W.2d 524, 534-35 (Tex. Crim. App. 1993).

109. This Court finds that applicant has failed to prove by a preponderance of the evidence that he received ineffective assistance because his trial counsel did not investigate confirmation of applicant's alleged alibi through the narcotic surveillance of the Irving Police Department. This Court finds that applicant has failed to prove such evidence existed and this Court further finds that applicant fails to show how his unsubstantiated accusation proves that there was a reasonable probability that, but for his trial counsel's inaction, the result of the trial would have been different. See Guidry v. State, 896 S.W.2d 381, 385 (Tex. App.--Texarkana, 1995, no pet.); Strickland v. Washington, 466 U.S. at 694.

110. This Court finds, based on the credible assertions in the affidavit of Irving Police Department Detective Randall Johnson, that the Irving Police Department did not have any surveillance records in its possession that would tend to prove that applicant was anywhere other than at the Holiday Inn in Irving, Texas, during the time of the robbery/murder. Without such a showing, applicant has failed to prove by a preponderance of the evidence that his trial counsel's inaction constituted such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the

defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

111. This Court finds that applicant has failed to prove by a preponderance of the evidence that he received ineffective assistance when his trial counsel permitted information concerning applicant's affiliation with the "Moorish Science Temple" to come before the jury. This Court finds that applicant has failed to prove that evidence of his affiliation with this group was not relevant to proving applicant's identity as the person who committed the robbery/murder and to demonstrate the reliability of eyewitness Donald Hall's identification of applicant. Without such a showing of harm, applicant has failed to prove by a preponderance of the evidence that his trial counsel's allowing this evidence to come before the jury constituted such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the

outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

112. This Court finds that applicant has failed to prove by a preponderance of the evidence that his trial counsel were not exercising sound trial strategy when they allowed the admission of evidence of applicant's group affiliation before the jury. Jackson v. State, 877 S.W.2d at 771. This Court finds that applicant, in fact, attempted to use his religious affiliation to his advantage in his punishment case-in-chief. (R.XIX:115). This Court finds that applicant has failed to overcome the presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment. Delrio v. State, 840 S.W.2d 724 (Tex. Crim. App. 1992).

113. This Court finds that applicant has failed to prove by a preponderance of the evidence that he received ineffective assistance because his trial counsel should have known that applicant's wife would be brought into the courtroom to be identified by a witness while dressed in her jail uniform, and therefore his trial counsel should have made a motion to have her dressed more appropriately before she entered the courtroom. This Court finds that applicant has failed to prove that his trial counsel made such a serious error in not making a motion before his wife entered the courtroom that they were not functioning effectively as counsel and that their actions amounted to professional errors that denied him a fair trial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052, 80 L. Ed. at 674.

114. This Court finds that applicant's trial counsel asked the jury to be excused before applicant's wife was brought into the courtroom and finds that if applicant's trial counsel had known that she would be brought into the courtroom in her jail garb, they would have made the objection at that time. This Court finds that, as soon as it became known to applicant's trial counsel that she was in her jail uniform, they did everything in their power to cure the prejudice, if any, by objecting and moving for a mistrial.

115. This Court finds applicant has failed to prove by a preponderance of the evidence that whatever harm applicant suffered by the appearance of applicant's wife before the jury in her jail uniform was not cured by the trial court's instruction to the jury to disregard her clothing. This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

116. This Court concludes as a matter of law that applicant's reliance on Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed. 126 (1976) is misplaced. This Court finds that the United States Supreme Court in Estelle was not faced with a similar fact situation as the instant case as applicant contends since Estelle himself was put to trial in identifiable prison clothing, whereas applicant was dressed in a suit during his jury trial.

117. This Court finds that even if Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed. 126 (1976) applies under the facts of this case, and even if the actions of applicant's trial counsel constituted error, applicant has failed to show a reasonable probability that the outcome of the trial would be different but for his wife appearing before the jury in her jail uniform. Strickland v. Washington, 466 U.S. at 694.

118. This Court finds that in analyzing a claim under Estelle, the Court of Criminal Appeals has held that where there is no showing of harm or prejudice to applicant and when the evidence prevails overwhelmingly against him, error, if any, is harmless beyond a reasonable doubt. Kimbel v. State, 537 S.W.2d 254 (Tex. Crim. App. 1976). This Court finds that applicant has not brought forth any evidence that he was harmed or prejudiced by his wife's appearance in her jail uniform. This Court finds that applicant himself was clothed in civilian clothing, as required in Estelle. Additionally, this Court finds that the evidence against applicant, from the eyewitness testimony to applicant's possession of the murder weapon when he was arrested, was overwhelming, and thus error, if any, is harmless beyond a reasonable doubt.

119. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied effective assistance of counsel and that his right to a fair trial suffered due to the fact that one of his trial counsel, Royce West, was running for the office of District Attorney of Dallas County, Texas, during his trial. This Court finds that applicant has failed to prove by a preponderance of the evidence that Mr. West's representation was deficient

because of his candidacy for the office of District Attorney of Dallas County. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052, 80 L. Ed. at 674. Applicant has also failed to prove that any deficient performance prejudiced the defense to such a degree that applicant was deprived of a fair trial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052, 80 L. Ed. at 674. This Court finds that applicant has failed to allege or prove by a preponderance of the evidence that any action by Royce West constituted such serious errors that he was not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

120. This Court finds that the trial court was aware of the fact that Royce West, at the time of applicant's trial, was a candidate in the Democratic Primary for the office of District Attorney of Dallas County, Texas, and found no conflict existed between Mr. West's representation of applicant and his candidacy. (R.XIV:47-48).

121. This Court finds that applicant has failed to prove that the pre-trial hearing on applicant's "Motion to Quash the Jury Selected and/or Select a Separate Jury" was not a justified inquiry into potential systematic prejudice against blacks serving on juries in Dallas County. This Court finds that, although Mr. West's political opponent was one of the nine witnesses called to testify in the hearing, Mr. Cunningham, not Mr. West, questioned him.

122. This Court finds that applicant has failed to rebut the presumption that his trial counsel performed competently. Jackson v. State, 877 S.W.2d 768,771 (Tex. Crim. App. 1994).

123. This Court finds that applicant has failed to rebut the presumption that his trial counsel made all significant decisions in the exercise of reasonable professional judgment. Delrio v. State, 840 S.W.2d 724 (Tex. Crim. App. 1992).

124. This Court finds that applicant has failed to prove by a preponderance of the evidence that his trial counsel's performance, viewed as a whole, was deficient, in that he made such serious errors they were not functioning effectively as counsel and that his trial counsel's deficient performance prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that his trial counsel committed omissions or other mistakes which, viewed as a whole, amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the errors. Strickland v. Washington, 466 U.S. at 694.

125. This Court has previously found that applicant failed to prove that a bona fide doubt existed as to his competency to stand trial, and this Court finds that without such a showing, applicant cannot prove that his appellate counsel was ineffective in not arguing on appeal that his trial counsel should have requested a hearing to determine his competency or a continuance until he regained his competency.

126. This Court has previously found that applicant failed to prove that the trial court erred in its finding that applicant was competent to stand trial, and this Court has previously found that applicant has failed to prove by a preponderance of the evidence that, without a bona fide doubt of the competency of applicant, the trial court had no cause to hold a competency hearing sua sponte; therefore, this Court finds that applicant has failed to prove that applicant's appellate counsel was ineffective in not arguing on appeal that the trial court erred in not conducting a competency hearing.

127. This Court has previously held that applicant failed to prove that his medication status affected his competency and that applicant failed to prove the trial court erred in failing to hold a hearing to determine the need for applicant's medication; therefore, this Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied effective assistance when his appellate counsel did not argue on appeal that the trial court erred in not conducting a hearing to determine the necessity of continuing or ending applicant's medication.

128. This Court has previously held that applicant failed to prove that the trial court erred in denying applicant's motion for continuance, which was based on "surprise" created by his co-defendant wife's invocation of her right to remain silent; therefore, this Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied effective assistance when his appellate counsel failed to argue on appeal that the trial court erred in its denial of the motion for continuance.

129. This Court has previously found that applicant failed to prove that the trial court erred in allowing evidence of applicant's affiliation with the Moorish Science Temple; therefore this Court finds that applicant has failed to prove by a preponderance of the evidence that applicant was denied effective assistance when his appellate counsel failed to argue on appeal that the trial court erred in allowing this evidence before the jury.

130. This Court has previously found that applicant failed to prove that he was denied effective assistance of counsel at trial; therefore, this court finds that applicant has failed to prove by a preponderance of the evidence that he was denied effective assistance on appeal when his appellate counsel did not allege any ineffective assistance claims regarding the representation by his trial counsel.

131. This Court finds that applicant has failed to prove by a preponderance of the evidence that his appellate counsel's performance, viewed as a whole, was deficient, in that he made such serious errors he was not functioning effectively as counsel and that his appellate

counsel's deficient performance prejudiced the defense to such a degree that the defendant was deprived of a full and fair appeal. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his appellate counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that his appellate counsel committed omissions or other mistakes which, viewed as a whole, amounted to professional errors such as to raise a reasonable possibility that the outcome of the appeal would be different but for the errors. Strickland v. Washington, 466 U.S. at 694.

132. This Court finds that applicant has failed to rebut the presumption that his appellate counsel performed competently. Jackson v. State, 877 S.W.2d 768,771 (Tex. Crim. App. 1994).

133. This Court finds that applicant has failed to rebut the presumption that his appellate counsel made all significant decisions in the exercise of reasonable professional judgment. Delrio v. State, 840 S.W.2d 724 (Tex. Crim. App. 1992).

134. Applicant's claims are without merit; thus, applicant fails to show that he was denied due process and fundamental fairness. Applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of

Criminal Appeals that relief be denied. The Court admits as evidence the exhibits of applicant and of the State attached to, or accompanying, their pleading in this case, and the Court has examined and considered those exhibits as well as the entire record in this case in reaching these findings of facts and conclusions of law. The Court finds that there are no controverted, previously unresolved facts material to the legality of applicant's confinement which require a further evidentiary hearing.

ORDER

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in cause number W85-78668-L(A) and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

all of the applicant's pleadings filed in cause number W85-78668-L(A) including his Application for Writ of Habeas Corpus and exhibits contained therewith and any subsequent filings;

the Respondent's Original Answer in cause number W85-78668-L(A) and exhibits contained therewith and any subsequent filings;

this Court's findings of fact, conclusions of law, and order;

the indictment, judgment, sentence, docket sheet, and appellate record in cause number F85-78668-L, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of this Court's findings of fact and conclusions of law, including its order, to applicant's counsel, Ruth Kollman, 6517 Hillcrest, Suite 310, Dallas, Texas, 75205, and to counsel for the State.

SIGNED this 16 th day of April, 1996

PAT MCDOWELL, SITTING FOR
JUDGE MANNY ALVAREZ
CRIMINAL DISTRICT COURT FIVE
DALLAS COUNTY, TEXAS

EX PARTE THOMAS JOE MILLER-EL | Habeas Corpus Application

WRIT NO. 31.001-01 | from DALLAS County

ORDER

This is an application for a writ of habeas corpus transmitted to this Court pursuant to the provisions of Article 11.07, V.A.C.C.P. Applicant was convicted of capital murder in the Criminal District Court Number Five of Dallas County and sentence was assessed at death following affirmative replies to the special issues submitted to the jury pursuant to Article 37.071, V.A.C.C.P.

In the present application Applicant raises thirteen allegations, some with subparts, challenging the conviction or the penalty assessed. The trial court judge entered findings of fact and conclusions of law and a recommendation that all relief requested be denied. We have reviewed the record along with the application itself and its supporting documentation. We find that the findings of fact and conclusions of law are fully supported by the record and that the recommendation should be followed.

Accordingly, all relief requested is denied.

IT IS SO ORDERED THIS THE 17TH DAY OF JUNE, 1996.

PER CURIAM

DO NOT PUBLISH

pltfs
encl 15

ORIGINAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JAN 31 2000
NANCY DOHERTY, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THOMAS JOE MILLER-EL	§	
	§	
Petitioner,	§	
	§	
VS.	§	
	§	NO. 3-96-CV-1992-H
GARY JOHNSON, Director	§	
Texas Department of Criminal	§	
Justice, Institutional Division	§	
	§	
Respondent.	§	

ENTERED ON DOCKET
JAN 31 2000
U.S. DISTRICT CLERK'S OFFICE

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and an order of reference from the district court. The findings and recommendation of the magistrate judge are as follow:

I.

PROCEDURAL BACKGROUND

Petitioner Thomas Joe Miller-El was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal. *Miller-El v. State*, No. 69,677 (Tex. Crim. App. September 16, 1992), *cert. denied*, 114 S.Ct. 100 (1993). Petitioner also filed an application for writ of habeas corpus in state court. The trial judge made written findings and recommended that the application be denied. The Texas Court of Criminal Appeals denied habeas relief in an unpublished opinion. *Ex parte Miller-El*, No. 31,001 (Tex. Crim. App. June 17, 1996). Petitioner then filed this action in federal court.

102

II.

ISSUES PRESENTED

Petitioner raises four issues in six grounds for relief. He contends that: (1) the prosecution exercised its peremptory challenges in a racially discriminatory manner; (2) a prospective juror was improperly struck for cause; (3) the trial court failed to conduct a competency hearing and allowed the trial to proceed despite the fact that he was incompetent; and (4) the prosecutor improperly referred to his religious affiliation during sentencing.

III.

STANDARD OF REVIEW

The standard of review in federal habeas proceedings is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, Pub.L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA establishes specific standards and procedures for reviewing death penalty habeas cases. *See* 28 U.S.C. §§ 2661-2266. These rules apply to all capital cases pending on or after the effective date of the AEDPA, provided the state has established a mechanism for the "appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings." *Id.* § 2261(a), (b) & (c). Texas does not yet meet these "opt-in" requirements. *Carter v. Johnson*, 110 F.3d 1098, 1104 (5th Cir.), *vacated on other grounds*, 118 S.Ct. 409 (1997). Therefore, the Court must look to the general standards of review under the AEDPA.

A federal court may not grant habeas relief with respect to any claim that was adjudicated on the merits in a state court proceeding unless petitioner shows that the prior adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law; or (2) resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). A state court decision is not "contrary to clearly established federal law" unless a different result was dictated by existing Supreme Court precedent. *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1114 (1997). A state fact finding is not "unreasonable" unless the petitioner can rebut the finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). An application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard*, 97 F.3d at 769.[1]

IV.

PEREMPTORY CHALLENGES
(Grounds 1 & 2)

In two related grounds for relief, petitioner argues that the prosecution used 10 of its 14 peremptory challenges to exclude African-Americans from jury service in violation of the equal protection clause of the Fourteenth Amendment.

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[1] Petitioner argues that *Drinkard* misinterpreted the standard of review for federal habeas cases under 28 U.S.C. § 2254(d)(1). The *Drinkard* court held that the first clause of the statute--prohibiting habeas relief unless the state court adjudication resulted in a decision that was "contrary to" clearly established federal law--applies only to questions of pure law. Under this interpretation, a federal court cannot grant habeas relief unless the state court failed to identify the correct rule of law when it adjudicated the claim. *Drinkard*, 97 F.3d at 767-68. Petitioner advocates a different interpretation of the "contrary to" clause. He suggests that the proper inquiry should be whether the Supreme Court had announced a controlling rule of law prior to the time the claim was adjudicated in state court. If so, a federal habeas court must decide whether the state court decision is "contrary to" that established law. Otherwise, the "unreasonable application" clause of the statute comes into play and the federal court must determine whether the state court adjudication was untenable under existing Supreme Court authority. (Pet. Reply at 13-17).

In sum, petitioner maintains that there is no basis for the distinction in the standard of review for "pure legal questions" and "mixed questions of law and fact" under the AEDPA. Both should be subject to review under the "unreasonable application" clause of section 2254(d)(1) where there is no Supreme Court authority directly on point. (*Id.*). *See Drinkard*, 97 F.3d at 778-79 (E. Garza, J., dissenting). Moreover, petitioner contends that the court's interpretation of the "unreasonable application" clause--making habeas relief available "only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists"--raises serious problems under Article III and the Suspension Clause of the U.S. Constitution. (Pet. Reply at 20). These are thoughtful and provocative arguments. Nevertheless, this Court is bound by the *Drinkard* majority and must follow its holding. *See Cedillo v. Valcar Enterprises & Darling Delaware Co.*, 773 F.Supp. 932, 936 (N.D. Tex. 1991) (district court is bound by Fifth Circuit precedent).

A. Applicable Law

The Fourteenth Amendment guarantees every defendant in a criminal case equal protection under the law. *Hernandez v. State*, 347 U.S. 475, 477, 74 S.Ct. 667, 670, 98 L.Ed. 866 (1954). This right extends to the jury selection process. *Swain v. Alabama*, 380 U.S. 202, 204, 85 S.Ct. 824, 826, 13 L.Ed.2d 759 (1965); *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 305-08, 25 L.Ed. 664 (1879). Thus, a prosecutor may not use his allotted peremptory challenges to exclude potential jurors solely on the basis of their race. *Swain*, 85 S.Ct. at 837-38. Prior to the *Batson* decision in 1986, the use of peremptory strikes against minorities in any single case was not unconstitutional. *Id.* at 836-37. Rather, a defendant was required to demonstrate a historical pattern of racial bias in the selection of juries. *Id.* at 837-38. The Fifth Circuit explained this burden as follows:

> In order to prevail [on a *Swain* claim], [petitioner] must prove that his prosecutor "had a systematic *and intentional* practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated through petitioner's trial."

Evans v. Cabana, 821 F.2d 1065, 1068 (5th Cir.), *cert. denied*, 108 S.Ct. 5 (1987), *quoting Willis v. Zant*, 720 F.2d 1212, 1220 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 3548 (1984) (emphasis in original). Absent evidence of purposeful and systematic discrimination, the prosecutor was entitled to a presumption that he used his peremptory strikes in a proper manner. *Swain*, 85 S.Ct. at 837.

The Supreme Court revisited this issue twenty years later in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Recognizing that it was often impossible for a defendant to prove the systematic exclusion of minorities from jury service over an extended period of time, the Court rejected this evidentiary formulation "as inconsistent with standards that

have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.*, 106 S.Ct. at 1721.[2] No longer were defendants required to establish a historical pattern of discrimination in the use of peremptory strikes. *Batson* held that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in *his case*." *Id.* at 1722 (emphasis in original).

A proper *Batson* challenge has three elements. First, the defendant must raise an inference that the prosecutor excluded potential jurors solely on the basis of race. *Id.* at 1723; *United States v. Wallace*, 32 F.3d 921, 925 (5th Cir. 1994). A defendant may satisfy this burden in a variety of ways, such as showing a pattern of strikes against minority jurors on the venire panel or statements made by the prosecutor during the voir dire examination. *Batson*, 106 S.Ct. at 1723. Once the defendant makes a *prima facie* case, the burden shifts to the prosecution to articulate a race-neutral explanation for each of the challenged strikes. *Id.* at 1723-24; *Wallace*, 32 F.3d at 925. This inquiry focuses on the facial validity of the proffered explanation. "Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (citations omitted); *see also United States v. Perkins*, 105 F.3d 976, 978 (5th Cir. 1997). The trial court then determines whether the defendant has proven purposeful discrimination. *Batson*, 106 S.Ct. at 1724; *Wallace*, 32 F.3d at 925.

When the record contains an explanation for the prosecutor's use of peremptory challenges, the reviewing court need only decide the propriety of the ultimate finding of discrimination.

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[2] The Supreme Court observed that the "crippling burden" imposed by *Swain* rendered the prosecution's use of peremptory challenges "largely immune from constitutional scrutiny." *Batson*, 106 S.Ct. at 1721. Indeed, this Court has found only two reported cases in which *Swain* relief was granted. *See State v. Washington*, 375 So.2d 1162 (La. 1979); *State v. Brown*, 371 So.2d 751 (La. 1979). Both cases involved the same prosecutor who essentially admitted that he systematically struck African-Americans from jury service. *Washington*, 375 So.2d at 1163-64.

Perkins, 105 F.3d at 978; *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). This finding is entitled to great deference because it largely turns on an evaluation of the credibility or demeanor of the attorney who exercises the challenge. *Hernandez v. New York*, 500 U.S. 352, 363, 111 S.Ct. 1859, 1869, 114 L.Ed.2d 395 (1991); *United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). In a federal habeas case, such a finding will not be disturbed "unless it constitutes an unreasonable determination of the facts in light of the evidence presented in the prior state court proceeding." 28 U.S.C. § 2254(d)(2); *see also Carter*, 110 F.3d at 1104.

B. State Court Proceeding

Petitioner, an African-American, was charged with intentionally causing the death of a hotel clerk during the course of a robbery. The state sought the death penalty. Jury selection began on February 3, 1986 and continued through March 5, 1986. The original venire consisted of 108 prospective jurors, including 18 African-Americans. Six of the African-American jurors were excused by agreement of the parties and one was struck for cause.[3] Both sides were then allowed 15 peremptory challenges. The prosecution used 10 strikes against African-Americans. The defense exercised all 15 of its challenges against non-minorities. One African-American was seated on the jury.[4]

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[3] The record shows that petitioner agreed to excuse Hilbert Gitchaway, Dora Randle, Vergie Miller, Jerry W. Moseley, Lourice Collier, and Johnnie Holman. (Pet. Supp. Brief, App. 1 at 60). Virginia Smith was struck for cause because of her views on the death penalty. (SF Voir Dire-II 1006).

[4] The only African-American not challenged by the prosecution, Troy L. Woods, was the quintessential state's juror. When asked about his feelings on capital punishment, Woods stated:

> It's too quick. They don't feel the pain . . . Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.

(SF Voir Dire-X 3848).

On March 9, 1986--just four days after the jury was empaneled--the *Dallas Morning News* ran a front-page story about jury selection practices in Dallas County criminal cases. *See* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986 at A1. (Am. Petition, Exh. 3). The newspaper article examined the racial and ethnic composition of juries in 100 randomly selected felony trials between 1983 and 1984. Of 467 African-American jurors qualified to serve in those cases, 405 were peremptorily challenged by the state. The study found that African-Americans were five-times more likely to be removed from a jury panel than whites, and twice as likely to be struck as Hispanics. Indeed, 70 of the 100 trials studied during the relevant time period had no African-American jurors at all.[5]

This article prompted defense counsel to file a motion to quash the jury panel. The motion was heard on March 12, 1986. At the hearing, petitioner attempted to show that the Dallas County District Attorney's office had an "unofficial policy" of excluding African-Americans from jury service. This policy dated back to the late 1950s, but was still being followed by some prosecutors at the time of petitioner's trial. Five current or former judges, two prosecutors, and two defense lawyers testified at the hearing.[6] One witness, former Assistan. District Attorney Jon

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[5] The same authors also studied 15 capital murder trials in Dallas County between 1980 and 1986. *See* Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986 at A1. (Am. Petition, Exh. 10). Of 62 African-Americans qualified to serve as jurors in those cases, 56 were struck by the state with peremptory challenges. Only five African-Americans served on capital murder juries during this time period. While five of the 15 cases involved African-American defendants, four of those defendants were tried by all-white juries. Ironically, petitioner was the only African-American defendant to have a trial before at least one member of his own race.

[6] Among the witnesses to testify at the hearing was Jack Hampton, presiding judge of the 283rd Judicial District Court. Judge Hampton served as an Assistant District Attorney in the late 1950s. He recalled being reprimanded by District Attorney Henry Wade after allowing an African-American woman to serve on a jury in a DWI case. (SF-3/12/86 Hrg. 59-60). Significantly, Wade still served as Dallas County District Attorney when petitioner was tried in March 1986.

Sparling, testified about a memo he wrote in 1969 on jury selection in criminal cases. (SF-3/12/86 Hrg. 27-57 & Def. Exh. 1). This 19-page document is punctuated with racial, ethnic, religious, and gender-based stereotypes. For example, Sparling advises prosecutors that "[w]ho you select, and what you qualify the panel on will depend on the type of crime, the age, *color* and sex of the [d]efendant . . ." (*Id.*, Def. Exh. 1 at 301) (emphasis added). He goes on to state that "[y]ou are not looking for any member of a minority group which may subject him to oppression" because "[m]inority races almost always empathize with the [d]efendant."[7] (*Id.*, Def. Exh. 1 at 303, 305). Sparling testified that his memo was used to train misdemeanor prosecutors and became part of a manual distributed to all members of the Dallas County District Attorney's office. (*Id.* at 29-30).

At the conclusion of the hearing, the trial judge found that there was "no evidence presented to me that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office." (*Id.* at 146). He therefore concluded that petitioner failed to establish a *Swain* violation. (*Id.*). The case proceeded to trial and petitioner was convicted of capital murder on March 26, 1986. One month later, the Supreme Court decided *Batson*.

On direct appeal, petitioner challenged the jury selection process under the more liberal *Batson* standard.[7] The Texas Court of Criminal Appeals found that petitioner had established an

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Other witnesses testified about more recent incidents of purposeful discrimination against African-American jurors. Harold Entz, presiding judge of Dallas County Criminal Court No. 4, said that one of his prosecutors wanted to shuffle a jury panel "because a predominant number of the first six, eight, or ten jurors were blacks." (*Id.* at 104). This occurred within the past "three or four years." (*Id.* at 103). Another judge, Ed Kinkeade, testified that he thought prosecutors had systematically excluded African-Americans from juries in his court. (*Id.* at 112-13). This observation was confirmed by Judge Larry Baraka, who barred a prosecutor from conducting voir dire in his court after an incident in 1985. (*Id.* at 74-75, 77). Judge Baraka admitted that there had been "a systematic exclusion of blacks by the State from juries" in the past. However, he thought "things had improved considerably" since about 1980. (*Id.* at 75-76).

[7] The Supreme Court has held that *Batson* applies retroactively to cases pending on direct review at the time it was decided. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987). Consequently, petitioner was able to raise this claim for the first time on appeal.

inference of purposeful discrimination because the prosecutor used "such a skewed number of strikes on the black veniremen" and "only a single black juror was seated on the panel." *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988). However, the prosecutor was never given an opportunity to explain his use of peremptory challenges. The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

This hearing was held on May 10, 1988. Paul Macaluso, the prosecutor who conducted voir dire, testified as to his reasons for striking each of the 10 African-Americans from the jury panel. The trial court determined that these explanations were race-neutral and negated any inference of purposeful discrimination.[8] Specifically, the court found that: (1) none of the explanations given by the prosecutor were based on group traits; (2) none of the jurors were questioned perfunctorily; (3) there was no disparate examination of the jurors; and (4) the primary reason given to support each peremptory challenge, the juror's reluctance to assess the death penalty, was closely and directly related to the facts of the case. (Supp. Tr. at 6-7). Petitioner challenged these findings on direct appeal. However, the Texas Court of Criminal Appeals found that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." *Miller-El v. State*, No. 69,677, op. at 2 (Tex. Crim. App. September 16, 1992).

C. *Swain* Claim

Petitioner seeks federal habeas relief under both *Swain* and *Batson*. He argues that these cases have distinct applications and provide independent grounds for challenging discriminatory

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[8] The trial court also found that petitioner failed to raise an inference of purposeful discrimination through the state's use of peremptory challenges. (Supp. Tr. at 4). However, this finding appears to be contrary to the decision of the Texas Court of Criminal Appeals. *See Miller-El*, 748 S.W.2d at 460 ("We find that appellant has established an inference as required by the *Batson* court.").

jury selection practices. Petitioner urges this dichotomy so he can take advantage of dicta in *Swain* analogizing a Fourteenth Amendment equal protection case to a Sixth Amendment fair cross-section claim once a *prima facie* showing of systematic discrimination has been made.[9] Since such evidence was presented in this case, petitioner maintains that he is entitled to an inference that the prosecutor used his peremptory challenges in a racially discriminatory manner.

This argument fails for several reasons. First, petitioner misreads *Swain*. While recognizing that "[t]otal exclusion of Negroes by the state officers responsible for selecting names of jurors gives rise to a fair inference of discrimination on their part," the Supreme Court held that "this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service." *Swain*, 85 S.Ct. at 839. The Court went on to explain:

> Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State.

Id. Thus, *Swain* rejected any analogy to fair cross-section cases without proof that the prosecutor systematically used peremptory strikes against minorities over a period of time. *Id.* at 839-40. Historical evidence, standing alone, was never enough to prove a *Swain* violation.

Nor is there any authority for the proposition that *Swain* somehow survives *Batson*. In fact, *Batson* specifically overruled *Swain*. *Batson*, 106 S.Ct. at 1725 n.25 ("To the extent that

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[9] The Sixth Amendment guarantees a defendant the right to trial by an impartial jury "drawn from a fair cross-section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 536, 95 S.Ct. 692, 700, 42 L.Ed.2d 690 (1975).

anything in [*Swain*] is contrary to the principles we articulate today, that decision is overruled."). Moreover, the two cases are wholly complementary with regard to their treatment of historical evidence. Under *Swain*, a defendant was required to prove systematic discrimination as a prerequisite to an equal protection claim. *Swain*, 85 S.Ct. at 837-38. This requirement was abolished in *Batson*. *Batson*, 106 S.Ct. at 1722. However, historical evidence can still be used to establish a *prima facie* case of discrimination in the jury selection process. *Id.* at 1721-22. A defendant may show that the prosecutor in his case had a practice of striking minority jurors over a period of time. It then becomes incumbent upon the prosecutor to explain his use of peremptory challenges in light of that fact. Regardless of the type of evidence presented, the standard of proof remains the same. It makes no difference whether the defendant's *prima facie* case is based on historical evidence or the actions of the prosecutor at trial. The court must consider the "totality of relevant facts" in determining whether purposeful discrimination exists in any particular case.

Finally, the Supreme Court has held that a defendant may not challenge the composition of a petit jury on the grounds that it does not represent a fair cross-section of the community. *Holland v. Illinois*, 493 U.S. 474, 487, 110 S.Ct. 803, 811, 107 L.Ed.2d 905 (1990). Rather, such a claim applies only to the venire from which the jury is ultimately selected. *Id.*, 110 S.Ct. at 807. It therefore follows that the standards governing a fair cross-section claim under the Sixth Amendment are not applicable to an equal protection claim under the Fourteenth Amendment. *Cf. id.* at 806 (rejecting invitation to extend *Batson* standards to Sixth Amendment fair cross-section claims).

The Court concludes that *Swain* does not provide an independent basis for challenging the prosecutor's use of peremptory challenges in this case. Petitioner's equal protection claim must be analyzed under the standard of proof articulated in *Batson*.

D. *Batson* Claim

Petitioner characterizes the evidence supporting his equal protection claim as "copious and multifaceted." (Am. Petition at 15). This is an understatement. His amended petition contains 202 pages of argument on this point, with citations to numerous state and federal authorities. Succinctly stated, petitioner contends that the jury selection practices employed by the state in his case were unconstitutional because: (1) the prosecutors had a documented history of using peremptory challenges against minorities in other cases; (2) African-American jurors were subjected to disparate questioning on the issue of minimum punishment; and (3) the state accepted non-minority jurors with the same characteristics as African-Americans who were struck by the prosecution. A brief discussion of these arguments, none of which were presented to the state court, is necessary to the disposition of this claim.[10]

1. Other Cases

Petitioner maintains that two of the prosecutors in his case, Paul Macaluso and Jim Nelson, "had a history of discriminating against African Americans in jury selection and that this practice continued at his trial." (Am. Petition at 59). As proof of discriminatory intent, he cites two other cases involving the same prosecutors. *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 2602 (1990); *Dorothy Jean Miller-El v. State*, 790 S.W.2d 351 (Tex. App.–Dallas 1990, pet. ref'd).[11] Both cases were reversed for *Batson* violations. Even assuming that this evidence constitutes a pattern of systematic discrimination, it is only relevant

[10] The Court asked the parties to brief the issue of whether petitioner fairly presented the factual basis of his "improper questioning" and "comparative juror analysis" claims in state court. *See* ORDER, 7/28/99. Respondent conceded that these arguments "are subsumed within the broad *Batson* issue and are not tantamount to the presentation of a new claim." (Resp. Supp. Brief at 2). Therefore, the Court will consider these claims on the merits.

[11] Dorothy Jean Miller-El is petitioner's wife. She was convicted of murder and attempted capital murder in a separate trial.

in determining whether petitioner has established a *prima facie* case under *Batson*. The state court already found that petitioner has met this burden. *Miller-El*, 748 S.W.2d at 460. Consequently, the focus shifts to the explanation proffered by the prosecution for its use of peremptory challenges. Historical evidence is of limited value in assessing whether the race-neutral explanations articulated by the prosecutor were a pretext for discrimination *in this case*.

2. Improper Questioning

Petitioner also contends that all African-American jurors were subjected to disparate questioning on the issue of minimum punishment. He points out that non-minority "pro-death penalty" jurors were fully informed of the range of punishment for murder and asked whether they could keep an open mind on the subject. However, the prosecutor posed the same question to non-minority "anti-death penalty" jurors and *all* African-American jurors in an open-ended manner. These jurors were asked, "What do you personally feel ought to be the minimum punishment for somebody committing a murder?" (SF Voir Dire-I 307-17). Most of the jurors responded with sentences well in excess of the statutory minimum of five years. When the prosecutor informed the jurors of the actual range of punishment, many felt that the minimum sentence was too lenient. As a result, they effectively disqualified themselves from serving on the jury.[12]

Obviously, petitioner intends to show that the prosecutors were of a mind to discriminate. However, no African-American jurors were peremptorily challenged because of their views on minimum punishment. Nor were any African-Americans struck for cause on that basis. Once again, the relevant inquiry in this case is whether the race-neutral explanations proffered by the

[12] Texas law allows the prosecution to challenge a prospective juror who demonstrates "bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment." TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) (Vernon 1989). Thus, the state may strike a juror who cannot agree to consider the minimum punishment. *Phillips v. State*, 701 S.W.2d 875, 884 (Tex. Crim. App. 1985), *cert. denied*, 106 S.Ct. 3285 (1986).

state for its use of peremptory challenges were pretextual. If those reasons withstand scrutiny, there is no equal protection violation. Any evidence about the prosecutor's motivation for asking a question that did not form the basis of a peremptory challenge is simply irrelevant.

3. Comparative Juror Analysis

The prosecutor explained that he struck nine African-American jurors because of their attitude toward the death penalty or their reluctance to serve on a death penalty jury.[13] Another African-American was struck because of her views on rehabilitation. Petitioner contends that these explanations were pretextual because non-minorities with the same or similar characteristics were accepted by the state. Consideration of this argument requires a careful review of the voir dire examination of each challenged juror.

a. Juror Bozeman

Roderick Bozeman was the seventh juror on the venire panel and the first African-American questioned. Bozeman said that he believed in capital punishment, but might have a problem sitting on a death penalty jury. (*Id.* at 282). When asked to explain his answer, Bozeman stated:

> It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

(*Id.* at 284). The prosecutor then inquired whether Bozeman could answer the special issues on punishment based solely on the evidence presented at trial, "knowing full well that [it might] result

[13] Petitioner admits that four African-American jurors--Linda C. Baker, Anna L. Keeton, Paul Bailey, and Janice Mackey-- were properly challenged because of their extreme reluctance to serve on a death penalty jury. (Am. Petition at 135 n.52).

in the execution of somebody who you personally don't desire to be executed." (*Id.* at 301).[14] Bozeman responded:

> I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

(*Id.*). A short time later, Bozeman changed his answer. He said, "I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it." (*Id.* at 306). The prosecutor struck Bozeman based on his "feelings on the death penalty" and his "obvious hesitation." (*Id.* at 323).

Petitioner contends that these reasons were pretextual because five non-minority jurors accepted by the prosecution also had misgivings about the death penalty or their ability to serve on the jury.[15] However, such a subjective consideration is not easily assessed from a cold record. *See United States v. Alston*, 895 F.2d 1362, 1367 n.5 (11th Cir. 1990) ("The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared . . . and often require an evaluation of the degree to which the prospective juror manifests the stated attribute.").

[14] Three special issues are submitted to the jury at the conclusion of the punishment phase of a capital murder trial. These questions are:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?
>
> (3) Whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(Vernon 1981). An affirmative finding on all three issues by a unanimous jury results in a death sentence. *Id.* art. 37.071(e).

[15] These jurors are identified as Noad O. Vickery, Ronald Salsini, Marie H. Mazza, Gwendolyn Smale, and Joan Weiner. Ironically, petitioner struck Vickery, Salsini, and Smale. (Pet. Supp. Brief, App. 1 at 0059).

Disparate treatment cannot automatically be imputed in every situation where the state rejects one juror with the same characteristics as another juror who is accepted. Indeed, the decision to strike a particular juror "may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). *See also Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir.), *cert. denied*, 118 S.Ct. 102 (1997) (both prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges).

The record does not reflect the demeanor of Bozeman or the non-minority jurors who expressed doubts or hesitancy about the death penalty. The tone of voice, facial expressions, and other physical qualities of these juror all bear on the assessment of whether their hesitation was merely passing or more deeply-rooted. The trial judge personally observed the proceedings and accepted the prosecutor's explanation for striking Bozeman. The Court must defer to that credibility determination. *Hernandez*, 111 S.Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

Nor is the fact that Bozeman later affirmed his ability to assess the death penalty necessarily dispositive. The use of peremptory challenges is often influenced by intuitive assumptions. *Lance*, 853 F.2d at 1181. The prosecutor is certainly allowed to conclude that a juror's initial indecision may not bode well for the state. *See Caldwell v. Maloney*, 159 F.3d 639, 655-56 (1st Cir. 1998), *cert. denied*, 119 S.Ct. 1152 (1999) ("[T]he prosecutor 'had no obligation either to ignore [the juror's comments about her reluctance] or to accept at face value [the juror's] prediction that, in the end, [she] could put aside [her] problem and do it right.'") (citation omitted). Such "gut reactions" are the essence of a peremptory challenge.

b. Juror Fields

Billy Jean Fields was the second African-American juror struck by the state. A

considerable portion of his voir dire examination focused on the special issue concerning future dangerousness. The prosecutor asked, "What sort of evidence do think would aid you . . . in deciding whether or not this is the type of individual that would probably do something of a criminal nature again?" (SF Voir Dire-I 419). Fields responded that he would want information about the defendant's background. (*Id.* at 420, 422). The following colloquy then occurred:

> Q: [BY PROSECUTOR]. Let me just ask you briefly: What does that word probability mean to you in that connotation?
>
> A: [BY JUROR]: Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.
>
> Q: Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?
>
> A: No.
>
> Q: You think everyone can be rehabilitated?
>
> A: Yes.
>
> Q: I'm just curious. How would you ever know that there is somebody that--well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?
>
> A: Well, I think you're talking about the fact of whether or not it was premeditated. It may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated.

F.2d at 1181.[17]

c. Juror Warren

The state used its sixth peremptory challenge against Joe Warren, another African-American member of the venire panel. When asked by the prosecutor whether he felt the death penalty accomplished a particular purpose, Warren responded:

> Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.
>
> * * * *
>
> I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

(SF Voir Dire-III 1532). At the *Batson* hearing, the prosecutor cited this answer as one of the reasons for striking Warren. (SF-5/10/88 Hrg. 31). He went on to explain that "at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a peremptory challenge. We did not think he would be a favorable juror for the State." (*Id.* at 32).

Petitioner points out that two non-minorities who had mixed feelings about the death penalty were not struck by the prosecution.[18] However, these jurors were not similarly situated to Warren. After stating that life imprisonment might be a fate worse than death, both non-minority jurors firmly asserted their belief that capital punishment was a deterrent to crime. (SF Voir Dire-III 3264-65; Voir Dire-VIII 1074-75). By contrast, Warren suggested that the death

[17] Petitioner argues that the other reason given by the prosecutor for striking Fields--that his brother had been convicted of a felony--was also pretextual. (SF Voir Dire-I 455). The Court need not address this argument in light of upholding the validity of the prosecutor's first explanation.

[18] These jurors are identified as Sandra Jenkins and Kevin Duke.

penalty might not serve any purpose. (*Id.* Voir Dire-III 1532). Clearly, his feelings on the subject were more ambivalent than the non-minority jurors accepted by the state. This indecision, coupled with the fact that the state still had nine peremptory strikes remaining, adequately supports the prosecutor's race-neutral explanation for challenging Warren.

d. Jurors Kennedy, Rand & Boggess

Three other African-American jurors--Wayman Kennedy, Edwin Rand, and Carrol S. Boggess--were struck by the prosecution because of their answers to certain questions about the death penalty. There is ample support in the record to support the exercise of these peremptory challenges.

All three jurors voiced concerns about sitting on a death penalty jury or imposing capital punishment in this type of case. Kennedy testified that the death penalty was only appropriate in "extreme cases . . . like a mass murder," and that a life sentence was sufficient for murder occurring during a robbery. (*Id.* Voir Dire-V 2176, 2178). He repeatedly refused to take a firm position on his ability to assess the death penalty until he heard the evidence. (*Id.* at 2182-94). Rand acknowledged that he had doubts about his ability to participate in assessing the death penalty. At first, he told the prosecutor that "somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." (*Id.* Voir Dire-IV 1805-06). Later, Rand said that he could impose a death sentence if warranted by the evidence. (*Id.* at 1809-11). Boggess was even more direct. Although she would serve on the jury if selected, Boggess said that "I wouldn't want to serve and I wouldn't want to have that responsibility to do that . . ." (*Id.* at 2008).

Petitioner argues that the views expressed by these African-American jurors were similar to those of non-minorities who were accepted by the state. However, the record does not support

this assertion. None of the non-minority jurors identified by petitioner ever said that the death penalty was not appropriate for a murder committed during the course of a robbery or that they did not want to serve on the jury. Moreover, some of the African-American jurors were struck because of their reluctance or hesitancy in answering questions about the death penalty. These subjective qualities are best judged by the trial court. *See Hernandez*, 111 S.Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

4. Conclusion

Petitioner has adduced a considerable amount of evidence showing that the Dallas County District Attorney's office had an unofficial policy of excluding African-Americans from jury service in years past. There is no other explanation for the appalling statistics brought to light by the *Dallas Morning News* in March 1986. Several judges and defense lawyers confirmed that prosecutors often used peremptory challenges against African-Americans and other minorities for no apparent reason other than race. Then there is the "Sparling Memo"--the article on jury selection that taught Dallas County prosecutors to strike prospective jurors on the basis of race, religion, ethnicity, and gender. Although this evidence is disturbing, it is not dispositive of petitioner's *Batson* claim.

In order to prove an equal protection violation, petitioner must show that the prosecutor used peremptory challenges to purposefully exclude African-Americans from the jury in *his case*. The historical evidence cited by petitioner helps him establish a *prima facie* case of discrimination. However, he also must demonstrate that the race-neutral explanations offered by the prosecution were merely pretextual. This heavy burden is heightened by the onerous standard of review in federal habeas cases. Here, the trial court found that "the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations

concerning the imposition of the death penalty, were closely and directly related to the facts of the case" and negated any inference of discrimination. (Supp. Tr. at 6-7). The record supports this determination. Consequently, the finding is not "unreasonable." *See* 28 U.S.C. § 2254(d); *Drinkard*, 97 F.3d at 769. This ground for relief is without merit and should be overruled.[19]

V.

CHALLENGE FOR CAUSE
(Ground 5)

Next, petitioner contends that the trial court improperly excused a prospective juror for cause based on her reluctance to impose the death penalty.

A. Applicable Law

The Sixth Amendment to the United States Constitution guarantees a defendant the right to trial by an impartial jury. U.S. CONST. amd. VI. This prevents the imposition of punishment in a capital case by a jury organized to guarantee a death sentence. *Witherspoon v. Illinois*, 391 U.S. 510, 521-22, 88 S.Ct. 1770, 1776-77, 20 L.Ed.2d 776 (1968). Still, a potential juror may be excused for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), *quoting Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). Juror bias need not be proved by "unmistakable clarity." *Witt*, 105 S.Ct. at 852. Rather, the trial judge has discretion to determine whether a prospective juror can faithfully and impartially apply the law. *Id.* at 852-53.

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[19] The Court also notes that an African-American served on the jury. The Fifth Circuit has suggested that this may be sufficient to negate a claim of purposeful discrimination. *See United States v. Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), *cert. denied* 107 S.Ct. 1625 (1987) (no hint of racial discrimination where two of the remaining twelve jurors were black).

This determination is entitled to a presumption of correctness and should be reversed only in a "clear case." *Id.* at 854 n.9, *quoting Reynolds v. United States*, 8 Otto 145, 98 U.S. 145, 156-57, 25 L.Ed. 244 (1879).

B. Discussion

All potential jurors were questioned about their feelings on capital punishment. One juror, Joyce Willard, explained her views on the subject as follows:

> Well, I feel that--of course, I know the bible says an eye for an eye and a tooth for a tooth, but to go further into detail, I feel like if you go and have premeditated thoughts about doing somebody bodily injury, then yes I do believe in the death penalty. If murder was not the utmost in your mind, them I'm not real sure what I--I don't know if I can give you an answer on that or not. I have mixed emotions about that.

(SF Voir Dire-VIII 3092). Willard later expressed reservations about imposing the death penalty for a murder that was not "premeditated." (*Id.* at 3095-96). The prosecutor told Willard that premeditation was not an element of capital murder. Rather, the state was only required to prove that the defendant "did knowingly or intentionally cause the death of an individual" while in the course of committing robbery. (*Id.* at 3098-99). After the prosecutor explained the elements of the offense in more detail, Willard said:

> [I]f it is proven and you have proved that this gentlemen has done these two things, if he went in there and intentionally caused someone--in the process he killed someone and it was proven that this happened--I don't know if there were any witnesses or what, but--I would have to go along with the death penalty then.

(*Id.* at 3102). The prosecutor then asked Willard if she could serve on a death penalty jury. At first she replied:

> That is very difficult for me to decide. Like I say, a human life is on trial here. I know one has been taken and I don't believe in taking a human life, of course. I have always had kind of mixed emotions, but I felt like somebody who took someone's life should be assessed the death penalty. Like I say, I don't--I may be contradicting what I told you before. I don't know if I could really assess the death penalty to another human life. If it came down to the point where it was proven to me beyond a shadow of a doubt that he was guilty, then I'm sure I could.

(*Id.* at 3106-07). Willard became equivocal upon further questioning by the prosecutor. (*Id.* at 3110-113). When pressed for a definite answer as to her ability to serve on the jury, Willard responded "no." The prosecutor then asked:

> Are you telling me that you would not take the oath because you don't feel like you are suited or you can serve on this type of a jury? If you're telling me that, that's fine.

Willard answered, "I believe that's what I'm telling you." (*Id.* at 3117).

Defense counsel attempted to rehabilitate this juror. He asked whether she could follow her oath by rendering a verdict based on the law and the evidence. Willard responded:

> If I were on the jury and had to be a part of rendering the verdict, I guess it would be--it would be difficult to render a verdict even though, like I told you, I do believe in capital punishment. If that was what was necessary to do and I were on the jury, I probably could go along even though it would be with me for the rest of my life.

(*Id.* at 3122). Willard continued to speculate as to her ability to take the oath. At one point Willard told defense counsel that she "would have to take the oath before I could be on the jury," but "I wouldn't want to." (*Id.* at 3124, 3127-28).

Eventually, the trial court intervened. The judge asked Willard if her personal feelings would interfere with her judgment about the law and the evidence in the case. Willard said, "Well, knowing me I would probably break down." (*Id.* at 3143). However, she reluctantly acknowledged her ability to answer the special issues based on the evidence. (*Id.* at 3148-49).

The judge then asked:

> Q: [THE COURT]: [C]an you take the oath to follow the law and then discharge your duties as a juror or can you not take an oath and do that, that is discharge your duties as a juror, whatever they may call you to do? Can you give me a yes or no and there won't be any more questions?
>
> A: [WILLARD]: I guess I better answer you no.
>
> Q: Ms. Willard, no, you could not take the oath, right?
>
> A: I don't guess I could after all these things have been put to me. I thought maybe I could, but after the way things have been presented to me and the way I'm understanding things, if I'm understanding correctly, then I don't believe I could.
>
> Q: One final quibble with you. You used the words I think and unfortunately--you said no and then you said I think. Is it no, I cannot do it or yes, I can do it or--
>
> A: Okay. We'll put no I cannot do it.

(*Id.* at 3150-51).

The trial court excused Willard for cause. Petitioner now contends that Willard only began expressing doubts about her ability to sit on the jury after the prosecution presented a distorted and manipulative view of Texas law. He accuses the prosecutor of attempting to sow artificial doubt in the mind of this juror by "hammer[ing] home the grisly realities of the death sentence, while offering [her] an 'escape hatch' to avoid jury service by implying that she need not serve if doing so would trouble her conscience." (Am. Petition at 293). The Court has carefully reviewed the voir dire examination and finds no evidence of impropriety. Evidently, neither did defense counsel since he never objected to any of the prosecutor's questions. The lengthy colloquies involving Willard's ability to take the oath and serve on the jury were the result of her own indecision and equivocation--not any improper questioning by the prosecutors.

Petitioner further argues that there was no legal basis to strike Willard for cause. He points out that Willard believed in capital punishment. She merely "expressed hesitation and emotional turmoil at the prospect of rendering a verdict that would result in another person being killed." (Am. Petition at 303). If this were the extent of her testimony, Willard might not be disqualified. *See, e.g. Alderman v. Austin*, 663 F.2d 558, 563 (5th Cir. 1981), *aff'd on reh'g*, 695 F.2d 124 (5th Cir. 1983) (jurors who favored capital punishment and could vote to inflict the death penalty were not disqualified because of inability to sign verdict form). However, Willard also stated that she could not take the oath and discharge her duties as a juror. At best, her testimony was ambiguous and contradictory. (SF Voir Dire-VIII 3146, 3148-49, 3115, 3127). The trial court struggled with this issue and concluded that "[Willard's] view about participating in the death penalty process would prevent or substantially impair her performance of her duties as a juror in this case." (*Id.* at 3155). As the Supreme Court has noted:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear;" these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . *[T]his is why deference must be paid to the trial judge who sees and hears the jurors.*

Witt, 105 S.Ct. at 852 (emphasis added). Such is the case here. The trial judge had an opportunity to observe Willard's demeanor and assess her credibility. He ultimately concluded that she could not take the oath and accept the duties of her office. Petitioner has failed to establish that this determination was "unreasonable . . . . in light of the evidence presented in the

state court." 28 U.S.C. § 2254(d). This ground for relief should be overruled.[20]

VI.

COMPETENCY
(Grounds 3 & 4)

Petitioner raises two arguments regarding his mental competency. First, he contends that the trial court should have conducted a competency hearing. Second, he claims that he was not competent to stand trial.

A. Applicable Law

Due process prohibits the trial of a defendant who is mentally incompetent. *Godinez v. Moran*, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685, 125 L.Ed.2d 321 (1993); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966). This means that a defendant must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense . . ." *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). *See also Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The burden of establishing mental incompetency is extremely heavy. In order to obtain habeas relief, a petitioner must show that "the facts are 'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt' as to his mental competency at the time of trial." *Dunn v. Johnson*, 162 F.3d 302, 306 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1507 (1999), *quoting Washington v. Johnson*, 90 F.3d 945, 950 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1259 (1997).

State courts must employ procedures designed to protect against the trial of incompetent defendants. *Drope*, 95 S.Ct. at 904-05; *Pate*, 86 S.Ct. at 842-43. A competency hearing is required "if the evidence raises a bona fide doubt as to the defendant's competency at that time." *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980). The trial court should consider: (1) any history of irrational behavior; (2) the bearing and demeanor of the defendant in court; and (3) prior medical opinions. *See Dunn*, 162 F.3d at 305; *Reese v. Wainwright*, 600 F.2d 1085, 1091 (5th Cir.), *cert. denied*, 100 S.Ct. 487 (1979).

B. Medical Evidence

Petitioner was shot by Houston police officers at the time of his arrest on November 21, 1985.[21] He sustained serious abdominal injuries and was taken to Ben Taub Hospital for treatment. Surgeons removed part of his intestines, repaired damage to his internal organs, and performed a double-barreled colostomy. Petitioner remained hospitalized for eight weeks. During this time, he experienced complications and underwent an exploratory laparotomy to remove adhesions. Petitioner lost a total of 57 pounds during his hospital stay. He was eventually discharged to the custody of Harris County officials on January 12, 1986. (Am. Petition, Exh. 18).

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[20] Although not mentioned in his brief, petitioner has provided the Court with a copy of the Findings and Recommendation of Magistrate Judge Charles Bleil in *Troy Dale Farris v. Gary Johnson*, No. 4-94-CV-0142-Y (N.D. Tex. January 21, 1997) (Am. Petition, Exh. 35). The issue presented in *Farris* is similar to the one raised by petitioner in the instant case–whether a prospective juror was improperly excused for cause based on her opposition to the death penalty. Judge Bleil noted that the juror consistently maintained she could answer the special issues on punishment and follow the law given by the court. Consequently, there was no legal basis to challenge the juror for cause. *Farris*, No. 4-94-CV-0142-Y, op. at 55-56.

Unlike the juror in *Farris*, Joyce Willard said that she could *not* take the oath or discharge her duties as a juror. This fact alone distinguishes the two cases. More importantly, Judge Bleil's recommendation was rejected by the district judge. *Farris v. Johnson*, 967 F.Supp. 200, 206 (N.D. Tex. 1997), *aff'd*, 144 F.3d 50 (5th Cir.) (Table), *cert. denied*, 119 S.Ct. 516 (1998). Therefore, *Farris* does not dictate a contrary result.

[21] Petitioner fled to Houston after he killed a motel clerk in Irving, Texas. He was apprehended five days later by Houston police officers. The shooting occurred when petitioner approached one of the officers with a KG99 machine gun as he was attempting to evade arrest. (SF Trial-II 687, 698-704).

Four days later, petitioner arrived at the Dallas County Jail. He complained of pain at his colostomy site and swollen extremities. Petitioner was treated with a variety of medications and placed on a double portion diet to regain weight. Jail records show that petitioner began experiencing chest pain on January 21, 1986. The next day, his symptoms included "chills and fever." Petitioner was given Motrin and Septra, an antibacterial medication. A wheelchair was ordered so he could go to court. However, petitioner no longer needed a wheelchair by the time jury selection began on February 3, 1986. (*Id.*, Exh. 21 & 22).

At the end of the first week of jury selection, petitioner still had chest pain, chills, and fever. This prompted the trial judge to order a medical evaluation. (*Id.*, Exh. 21). Petitioner was taken to Parkland Hospital on February 10, 1986, where he was diagnosed with pneumonia. He was discharged the same day with a prescription for Darvocet and Erythromycin. (*Id.*, Exh. 24). Jury selection resumed the next morning.

Petitioner continued to complain of chest pain throughout the month of February. He also reported delays in the receipt of his medication.[22] On February 19, 1986, the trial judge asked the jail doctor to determine whether petitioner needed more pain medication for his "well-being." (*Id.*, Exh. 27). Dr. Adrian Collyns responded to this inquiry on February 24, 1986. He advised the judge:

> I have seen this man professionally on a number of occasions recently. A chest Xray on Feb. 21, 1986 was done. In my opinion he does not now require prescription pain killers.

(Am. Petition at 231).

[22] Petitioner alleges that the jail medical staff "continually failed to [administer] his antibiotics and pain medication on schedule." (Am. Petition at 227). The Court acknowledges that the medical records are less than clear on this point. However, this ambiguity does not necessarily establish that the medications were not given as directed.

The next day, defense counsel protested that petitioner had not been getting his medication on a regular basis. Petitioner then told the judge that he had not seen a doctor since his last visit to Parkland Hospital on February 10, 1986.[23] The judge replied:

> [THE COURT]: Mr. Cunningham and Mr. West, the only thing I can say–first of all, I received a letter from a Dr. Adrienne [sic] H. Collyns, which I'll make part of the Court's file, and it says in so many words, as of February 24th, he does not have the opinion that the Defendant needs pain killer prescriptions. Now, whether he needs other medicines, I don't know. I'm not obviously a doctor. I'm going to be guided by what the jail doctors say. If you-all have any suggestions, I'll be glad to help you in any way I can.
>
> [DEFENSE COUNSEL]: If he says as of February 24th, that would be yesterday and I don't know if the doctor would say that if he hasn't seen him.
>
> [THE COURT]: I got this letter delivered to me late yesterday afternoon after we recessed.
>
> [DEFENSE COUNSEL]: I would ask the Court to at least have whoever that doctor is examine Mr. Miller-El and I would also like to talk with him to see whether or not–what he is using to base that on for Mr. Miller-El's benefit because he tells Mr. West and he tells myself that he's hurting and he needs some medicine. We don't want him to think that we're not advising the Court.
>
> [THE COURT]: I'm advised and I'm pretty well guided by what the doctor says. Let me suggest that you and Mr. West talk to Dr. Collyns or the jail nurse up there and see what their answers are to your questions. If there is a dispute, I'll be glad–
>
> [DEFENSE COUNSEL]: Mr. West will track it down, Judge, and we'll go on with Ms. Williams.

(SF Voir Dire-VII 2782-84).

[23] Petitioner acknowledged that he had seen a nurse as recently as February 20, 1986, but "they say that they can't do nothing." (SF Voir Dire-VII 2782).

Petitioner was examined again by Dr. Collyns on February 26, 1986. He complained of constant chest pain that worsened at night. The doctor noted some tenderness and mild swelling over the right inferior scapula area. His lungs were clear with good breath sounds. Based on the results of this examination, Dr. Collyns concluded that petitioner was "fit to attend court." (Am. Petitioner, Exh. 21).

These symptoms persisted for several more days. During this time, petitioner continued to receive antibiotics and non-prescription medications. Then on March 4, 1986--just two days before jury selection concluded--petitioner was taken to Parkland Hospital for treatment of a chest abscess. He developed an infection and returned to the hospital six days later. A follow-up visit was scheduled for March 12, 1986. However, wound care was provided by the jail medical staff instead. (*Id.*, Exh. 21 & 22).

The next entry in petitioner's medical chart is dated March 20, 1986--one week after the trial began. Petitioner complained of soreness around his rib cage and asked to see a doctor. The next day, the following exchange occurred in open court:

> [PROSECUTOR]: Mr. Hall, you have previously identified the man *sitting* at the end of the table–
>
> [DEFENSE COUNSEL]: Your Honor, we'll object. He's not *sleeping*.
>
> [PROSECUTOR]: Well, he was when I was--
>
> [DEFENSE COUNSEL]: Your Honor, I would object to the side-bar remark.
>
> [THE COURT]: Sustained. Disregard that, ladies and gentlemen.

(SF Trial-III 1151) (emphasis added).[34] The trial court then recessed the proceedings until March 24, 1986.

Shortly after the trial resumed, the state concluded its case-in-chief. The defense rested without presenting any evidence and both sides closed. At that point, the trial judge advised petitioner of his right to testify and the consequences of doing so. Petitioner said that he understood his rights but did not want to testify. The court then stated:

> [THE COURT]: [I]t might be a bit late to ask this question, but I've seen no evidence that the Defendant is not competent to either stand trial or make these decisions on his own behalf
>
> [DEFENSE COUNSEL]: *Your Honor, to the best of my knowledge, Mr. Miller-El is competent and is aware of the facts and knows what is going on. Is that true, Mr. Miller-El?*
>
> [DEFENDANT]: *Yes.*
>
> [THE COURT]: Well, I'll note for the record that throughout the trial including voir dire that this Defendant appeared, from the bench, to participate actively with his lawyers in jury selection decisions and also during the trial as regards cross-examination of witnesses and such as that. Having heard nothing else, I'm going to find that he makes his decision competently and I, of course, will honor it.

(*Id.* at 1197-98) (emphasis added).

The guilt-innocence phase of the trial ended that day with a finding of guilt. Later that evening, petitioner complained of nausea and a problem with his colostomy bag. (Am. Petition, Exh. 21). The trial judge ordered a medical evaluation to determine whether petitioner was "able to sit thru court." (*Id.*, Exh. 29). Petitioner was taken to Parkland Hospital and kept overnight

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[34] It is not clear whether the prosecutor actually referred to petitioner as "the man *sleeping* at the end of the table" or whether defease counsel misunderstood the question. However, the record reflects that petitioner was seated at the end of the table next to his attorneys. (SF Trial-I 419).

for treatment of a small bowel obstruction. (*Id.*, Exh. 24).

The punishment phase of the trial commenced on March 25, 1986--the same day petitioner was released from the hospital. The following afternoon, the jury sentenced him to death. Petitioner continued to have problems with his colostomy bag and recurrent infections over the next eight months. His condition finally improved after surgeons closed his colostomies in November 1986. (*Id.*, Exh. 21, 24, 30-32).

C. State Habeas Proceeding

Petitioner did not challenge his mental competency on direct appeal. Instead, he first raised the issue in an application for writ of habeas corpus.[25] Petitioner alleged, *inter alia*, that he was not competent to stand trial due to his debilitating physical injuries, complications arising from his surgeries, and the side effects of pain medication. The state answered these allegations in a written response. Both parties submitted supplemental briefs and expert affidavits in support of their respective positions.

The state relied on the Affidavit of Steven P. Bowers, Medical Director for the Dallas County Jail System. Dr. Bowers reviewed selected portions of petitioner's medical records and a chronology of events prepared by the state. He noted that petitioner was on a number of medications during his trial. However, the only medication that might have affected him to any degree was Darvocet. Dr. Bowers explained that Darvocet is "relatively low in strength compared to other prescription pain medications." According to the medical records, petitioner received two Darvocet tablets three times a day. This is less than the maximum allowable dosage. Dr. Bowers found no indication that petitioner was impaired by any of his medications. He did not exhibit a

[25] Petitioner filed his application for post-conviction relief on May 16, 1995--nearly *nine years* after his trial concluded and just hours before his scheduled execution.

pattern of recurrent drowsiness, stupor, being difficult to arouse, or any bizarre behavior. Although petitioner was transported to the hospital several times during his trial, Dr. Bowers noted that each treatment was less than 24 hours in duration. This indicated that most of his medical problems were not serious. Based on this evidence, Dr. Bowers concluded that petitioner was competent to stand trial and assist in his defense. (Am. Petition, Exh. 25).

Petitioner countered with the Affidavit of Ari Kiev, a board-certified psychiatrist. Dr. Kiev reviewed all of petitioner's medical records and evidence submitted by both parties in the state habeas proceeding. This evidence showed that petitioner was in a weakened condition at the time of his discharge from Ben Taub Hospital on January 12, 1986. Petitioner was anemic, had a substantially reduced blood volume, and lost a considerable amount of weight. He also experienced complications with his colostomies, suffered from pneumonia, developed recurrent infections, and frequently complained of pain throughout the trial. Dr. Kiev noted that petitioner was medicated with Darvocet, which "can sometimes produce sedation and dizziness as side effects." He believed that petitioner may have experienced some of these symptoms while taking the medication. Dr. Kiev stated that the combination of these factors, together with an inadequate diet and sleep deprivation, "contributed to an inability of [petitioner] to participate fully and to the best of his normal abilities in the preparation and presentation of his own defense . . ." He then offered this rather bold assessment of petitioner's mental state:

> [Petitioner], because of the depressive effects of a prosthesis such as a colostomy, which reduces the recipient's ability to deal with stress, his physical debilitation and a depressive reaction secondary to his injury and circumstances, which produces apathy and lethargy, had given up and resigned himself to his fate, and was not showing any of the self protectiveness and survival instincts which would otherwise be normal under the circumstances.

Dr. Kiev surmised that petitioner "would have exhibited such a level of passivity and willingness to go along with whatever was offered that it amounted to an expression of suicidal intent to end his life." In his opinion, petitioner should have been evaluated to determine his mental competency. (*Id.*, Exh. 19).

The trial court resolved this conflicting evidence in favor of the state. Specifically, the court found that: (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his defense; and (3) a competency hearing was not required because "there was no 'bona fide doubt' as to [petitioner's] competence to stand trial." (*Id.*, Exh. 34 at ¶¶ 17-21). The judge based his findings on the exhibits submitted by both parties, the chronology of events prepared by the state, and his own recollection. After conducting an independent review of the record, the Texas Court of Criminal Appeals reached the same conclusion and denied habeas relief. *Ex parte Miller-El*, No. 31,001-01.

D. Discussion

Petitioner argues that the state habeas proceeding was flawed in four respects: (1) the chronology of events prepared by the state omitted significant information and misrepresented critical facts about his medical condition; (2) the Affidavit of Dr. Steven Bowers was incomplete and unreliable; (3) the trial court ignored his evidence; and (4) the state improperly submitted its proposed findings of fact and conclusions of law to the trial court *ex parte*. As a result of these defects, petitioner contends that he was denied a full and fair opportunity to litigate his competency claim in state court. He therefore seeks a *de novo* review in federal court.

A federal habeas petitioner is entitled to a *de novo* review of a state court's competency determination only "when he makes a showing by clear and convincing evidence to raise threshold

doubt about his competency." *Carter v. Johnson*, 131 F.3d 452, 460 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1567 (1998), *quoting Lokos*, 625 F.2d at 1261. In order to raise such a doubt, a petitioner must present facts sufficient "to positively, unequivocally and clearly generate a real, substantial and legitimate doubt" concerning his mental capacity. *Carter*, 131 F.3d at 460 (citations omitted); *see also United States v. Williams*, 819 F.2d 605, 609 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 726 (1988). Petitioner has failed to meet this heavy burden. Nothing in the trial record suggests that he lacked the capacity to understand the proceedings, consult with his lawyers, or assist in the preparation of his defense. To the contrary, defense counsel told the trial judge that petitioner was competent to stand trial and make decisions on his own behalf.[25] Petitioner agreed with that assessment. (SF Trial-III 1198). This fact, standing alone, is persuasive evidence that no *Pate* violation occurred. *See, e.g. Moody v. Johnson*, 139 F.3d 477, 482 (5th Cir.), *cert. denied*, 119 S.Ct. 359 (1998); *Reese*, 600 F.2d at 1092.

Moreover, the trial judge had an opportunity to observe petitioner's demeanor and behavior on a daily basis over an eight-week period. The judge ordered at least two medical evaluations to determine whether petitioner was "able to sit thru court." (Am. Petition, Exh. 27 & 29). None of the doctors who examined petitioner raised any concerns about his mental competency. In addition, petitioner was questioned by his attorneys and the trial judge at various points throughout

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[25] E. Brice Cunningham, lead trial counsel for petitioner, told the state habeas court that he was unaware of the "full gravity" of his client's medical condition. Cunningham testified:

> After learning more about [petitioner's medical condition] at the time of his trial, Trial Counsel would have brought the matter of Mr. Miller-El's medical condition to the court's attention, requested a Hearing to determine this fact, and would have done whatever was possible to assure Mr. Miller-El's receiving the best possible medical attention, either in the Dallas County Jail, Parkland Memorial Hospital, or some other medical facility that could have dealt with his problem.

(Am. Petition, Exh. 28 at 6). Significantly, Cunningham never stated that these medical problems prevented petitioner from cooperating with his lawyers or assisting in the presentation of his defense.

the proceeding. He answered all questions in a direct and coherent manner."[7] This evidence further undermines petitioner's competency claim.

Petitioner points out that his expert, Dr. Ari Kiev, thoroughly reviewed all the medical evidence and concluded that he was mentally incompetent to stand trial. The Court acknowledges that the affidavit prepared by Dr. Kiev is more detailed than the affidavit submitted by Dr. Bowers. However, this does not require the trial court to credit his testimony. Although Dr. Kiev opined that petitioner was unable to "participate fully and to the best of his normal abilities in the preparation and presentation of his own defense," the trial judge was entitled to rely on his own observations and the testimony of Dr. Bowers in reaching a different conclusion. *See Carter*, 131 F.3d at 461. Moreover, the Fifth Circuit has twice found similar expert psychiatric testimony insufficient to prove a "real, substantial and legitimate doubt" concerning mental competency so as to overcome the presumption of correctness attached to state court findings. *See id.*; *Williams*, 819 F.2d at 608-09. The fact that the trial court did not mention Dr. Kiev's affidavit in its findings does not overcome this presumption. *See Carter*, 131 F.3d at 461.

Nor is the anecdotal evidence cited by petitioner sufficient to rebut the state court findings. Petitioner refers to his repeated requests for pain medication and a comment made by the prosecutor that he was sleeping in court. There is no doubt that petitioner experienced some pain as a result of his physical injuries, pneumonia, and recurrent wound infection. However, there is no objective medical evidence that this pain or the side effects of his medication prevented petitioner from assisting in the preparation and presentation of his defense. Similarly, the

[7] Petitioner attempts to minimize the significance of his answers by characterizing them as single-word responses. (Am. Petition 238 n.43). However, the record shows that petitioner answered several questions with complete sentences. (SF Voir Dire-III 2779-84; Punishment-II 17-19).

prosecutor's ambiguous remark hardly constitutes clear and convincing evidence of mental incompetency. A careful reading of the record discloses that the prosecutor never accused petitioner of sleeping in court. Rather, he asked if a witness could identify petitioner as "the man *sitting* at the end of the table." Defense counsel apparently misunderstood the question and pointed out that petitioner was "*not sleeping*." (SF Trial-III 1151) (emphasis added).

Petitioner has failed to show that there are sufficient facts to "positively, unequivocally and clearly generate a real, substantial and legitimate doubt" as to his mental competency at the time of trial. *Moody*, 139 F.3d at 481; *Carter*, 131 F.3d at 460. Therefore, any defects in the state habeas proceeding were immaterial. This ground for relief is without merit and should be overruled.

VII.

RELIGIOUS AFFILIATION
(Ground No. 6)

Finally, petitioner contends that the prosecutor improperly referred to his religious affiliation and disparaged his beliefs during the punishment phase of the trial.

A. Applicable Law

The First Amendment protects the right of an individual to join groups and associate with others holding similar beliefs. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981). This precludes the state from introducing evidence of a defendant's "abstract beliefs" during the punishment phase of a criminal trial. *Dawson v. Delaware*, 503 U.S. 159, 168, 112 S.Ct. 1093, 1099, 117 L.Ed.2d 309 (1992). However, such evidence is admissible if it is sufficiently related to issues involved in the case. *Id.*, 112 S.Ct. at 1099; *Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir.), *cert. denied*,

118 S.Ct. 399 (1997); *Boyle v. Johnson*, 93 F.3d 180, 183 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 968 (1997).

B. Discussion

Petitioner belongs to a Muslim sect known as the Moorish Science Temple. Members of this religious group typically wear turbans and other distinctive articles of clothing. Approximately two weeks before the murder, petitioner attended a Moorish Feast at the Holiday Inn South in Irving, Texas. Two hotel employees identified petitioner as one of the participants at this function. Donald Ray Hall, the chief night auditor, testified that petitioner "was dressed in like a Moslim [sic] outfit and he had on a turban." (SF Trial-I 420). Philip Bond, the hotel manager, testified that several attendees "had turbans on their heads." (*Id.* at 27). Petitioner did not object to this testimony, and tacitly concedes that this evidence was admissible at the guilt-innocence phase of the trial to prove his identity.[23]

However, petitioner maintains that the prosecutor crossed the line when he questioned Stanley January during the punishment hearing. January testified that he met petitioner as part of a scheme involving illegal drugs. After January described his involvement in this scheme, the prosecutor inquired:

> Q: [BY PROSECUTOR]: Let me ask you: Did Thomas join some sort of political organization?
>
> A: [BY WITNESS]: Muslims, which is the Moorish Science Temple.
>
> Q: Temple of America?

[23] The trial court found that petitioner's affiliation with the Moorish Science Temple was relevant "to proving [his] identity as the person who committed the robbery/murder and to demonstrate the reliability of eyewitness Donald Hall's identification . . . " (Am. Petition, Exh. 34 at ¶ 111).

> A: Yes.
>
> Q: They are Muslims?
>
> A: Yes.
>
> Q: Did they attempt to get you to join their group?
>
> A: Well, me and Thomas Miller-El had a fall-out because he said that I wasn't into, you know, the Moorish Science Temple of America, and so by me not being into that, he just trusted me a little bit.

(SF Punishment-II 54-55). The prosecutor made two other references to petitioner's "so-called religious organization" while examining January. (*Id.* at 69, 80). He returned to this issue during closing argument:

> There's not a whole lot you can do for Don Hall, but there is about a million and a half other people that still live here and don't want this community turned into a war zone, where people like Miller-El can indulge in conduct that amounts to paramilitary activities, crime, whatever you want to call it: criminal behavior, whatever; whether it's political, philosophical, *religious or whatever*, if it's motivated by the facts in this case that show you it's uncontrollable and insatiable greed, nonetheless, it leaves in its wake what it left here.

(SF Punishment Arg. 5) (emphasis added).

The state court found that the prosecutor did not criticize or degrade petitioner's religious philosophy, beliefs, or practices. Moreover, the court found that the admission of this evidence did not inflame or prejudice the jury against petitioner on religious grounds. (Am. Petition, Exh. 34 at ¶ 85). Petitioner has failed to rebut these findings by clear and convincing evidence. The passing references to his "so-called religion" and possible religious motivation for the crime are

equivocal at best.[29] In addition, the jury was already aware of petitioner's religious affiliation because it was properly introduced into evidence during the guilt-innocence phase of the trial. Petitioner has failed to establish an error of constitutional magnitude that justifies federal habeas relief.

RECOMMENDATION

Petitioner's application for writ of habeas corpus should be denied.

DATED: January 31, 2000.

JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

[29] Indeed, petitioner acknowledges that "it is impossible to determine what role the Moorish Science Temple evidence played in his death sentence." (Am. Petition at 336).

(14)

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 5 2000
NANCY DOHERTY, CLERK
BY
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THOMAS JOE MILLER-EL

Petitioner,

v.

GARY JOHNSON, Director, Texas Department of Criminal Justice Institutional Division

Respondent.

Civil No. 3:96-CV-1992-H

ENTERED ON DOCKET
JUN - 5 2000
U.S. DISTRICT CLERK

MEMORANDUM OPINION AND ORDER

This is a death penalty case.

Before the Court are the Findings and Recommendation of the United States Magistrate Judge, signed January 31, 2000; and Petitioner's Objections, filed February 25, 2000. Magistrate Judge Kaplan recommended that Miller-El's habeas corpus petition be denied. Pursuant to Fed. R. Civ. P. 72(b), this Court has made a de novo review of the portions of the Magistrate Judge's disposition objected to by Petitioner. Additionally, the Court heard oral argument from Petitioner and Respondent on April 25, 2000.

Based on the pleadings, evidence, and arguments of counsel, the Court hereby **ADOPTS** the findings and recommendation of the Magistrate Judge, except as **MODIFIED** below. Miller-El's petition for a writ of habeas corpus is **DENIED**.

I. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ("AEDPA") STANDARD

At the outset, the Court recognizes the recent changes in habeas jurisprudence. Pursuant to the AEDPA, a federal court may not grant habeas relief on any claim that was adjudicated on

the merits in a state court proceeding unless the petitioner shows that the prior adjudication: (1) resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established federal law;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Until very recently, the Fifth Circuit had held that an application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996). The Supreme Court recently suggested that this standard is erroneous. *See Williams v. Taylor*, __ U.S. __, 120 S.Ct. 1495 (2000). In *Williams*, decided April 18, 2000, the Court criticized the Fifth Circuit's standard:

> The 'all reasonable jurists standard' would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its 'reasonable jurist' standard in just such a subjective manner. *See Drinkard v. Johnson*, 97 F.3d 751, 769 (1996) ....

Williams, 120 S.Ct. at 1521-22. It appears that the *Drinkard* opinion has been overturned to the extent it required a subjective inquiry into what is an "unreasonable application" of facts to the law. The Supreme Court went on to ostensibly clarify that, under AEDPA, a state court decision may be incorrect or erroneous application of the law to the facts, but may not be an unreasonable application. *See Williams*, 12 S.Ct. at 1522.

The Magistrate Judge made his recommendation before *Williams v. Taylor* was decided, and cited the *Drinkard* "reasonable jurists" standard of review. Therefore, the Court modifies the portions of the Magistrate Judge's recommendation that rely on *Drinkard*. (Magistrate's Findings

at 3, 23). However, upon review of the pleadings, the Court finds that the change in the standard review has no determinative effect on the findings of the Magistrate Judge.

II. BATSON[1] AND SWAIN[2] CLAIMS

A. Swain claim

The Court agrees with the Magistrate Judge that *Swain* does not provide an independent basis for challenging the prosecutor's use of peremptory challenges, and that Petitioner's claim must be analyzed under *Batson*. In each of the cases cited by Petitioner that allow relief under *Swain* (Petition at 179, 184; Objections at 9 n. 4), *Batson* was found inapplicable because it was decided after the defendant's conviction and appeal. Miller-El cites no case that grants *Swain* relief in which *Batson* was also applied to the prosecutor's use of peremptory challenges. Therefore, the Magistrate Judge's recommendation on the *Swain* claim is accepted in whole.

B. Batson claim

The principal legal objection to the Magistrate Judge's recommendation on the *Batson* claim is that the Magistrate should have placed more weight on the strong evidence of discrimination in jury selection by Dallas County District Attorneys at the time of Petitioner's trial. Petitioner cites the plurality in *Hernandez v. New York*, 500 U.S. 352 (1991) for the proposition that the trial judge must take all evidence into account in the third step of the Batson inquiry—whether the Defendant has proved purposeful discrimination. However, *Hernandez* also stands for the deference of a federal habeas court to the credibility determination of the state trial judge in determining discriminatory intent. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). The Magistrate Judge properly deferred to the experience of the trial court judge in

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[2] *Swain v. Alabama*, 380 U.S. 202 (1965).

evaluating the demeanor of each juror and the prosecutor in determining purposeful discrimination.

Petitioner's objections to the Magistrate's factual findings are overruled. The Magistrate Judge did not "discount the massive evidence" in support of the first step of the *Batson* inquiry—the prima facie case that the prosecutor excluded jurors solely on the basis of their race. Rather, the Magistrate noted that an inference of purposeful discrimination had already been found by the Court of Criminal Appeals, and determined that further discussion of the evidence in support of the prima facie case was unnecessary.

III. COMPETENCY CLAIMS

Miller-El's first objection is that the Magistrate Judge failed to conduct a *de novo* review of his *Pate*[3] and *Dusky*[4] claims. Miller-El cites no authority for the proposition that a state trial court's adoption of one party's proposed factual findings and legal conclusions corrupts the judicial process so that his claim is not "adjudicated on the merits" under 28 U.S.C. § 2254(d). Equally, there is no authority that the Fifth Circuit has adopted the pre-AEDPA *Townsend*[5] exceptions to the presumption of correctness in 28 U.S.C. § 2254(d) and 28 U.S.C. § 2254(e)(1).

Miller-El's second objection is that the Magistrate Judge did not expressly address his *Pate* claim. This Court holds that the Magistrate's factual findings show that the *Pate* claim is not meritorious. Objectively considered, the information received by the trial court regarding Miller-El's condition would not have alerted him to the possibility that Petitioner could not rationally aid his attorney in his defense. Both the Petitioner and his attorney, as well as the trial judge, state

[3] *Pate v. Robinson*, 383 U.S. 375 (1966).

[4] *Dusky v. United States*, 362 U.S. 402 (1960).

[5] *Townsend v. Sain*, 372 U.S. 293 (1963).

on the record that Miller-El was competent and aware of the proceedings. The Court finds that Petitioner has not established a *Pate* claim.

Finally, the Court overrules Petitioner's objections to the Magistrate Judge's factual findings, as they are supported by the record in this case.

IV. CHALLENGE FOR CAUSE

The Magistrate Judge held that juror Joyce Willard was not improperly excluded from the jury panel in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Petition's objections point to no demonstrable error of law or fact. Therefore, the Court adopts the Magistrate Judge's findings and recommendation as to Petitioner's fifth ground for relief.

V. IMPROPER MENTION OF RELIGIOUS AFFILIATION

Petitioner claims that references to his membership in the Moorish Science Temple a the guilt-innocence and sentencing phase of this trial were in violation of *Dawson v. Delaware*, 503 U.S. 159, 165 (1992). While there is no "per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment," the government may only use such evidence when it is sufficiently related to the issues involved. *Dawson v. Delaware*, 503 U.S. 159, 165 (1992).

Petitioner objects that the Magistrate Judge did not explain the significance of the few references to Petitioner's religious affiliation at the punishment stage. The Court finds that, as evidence had been submitted at trial that other members of the Moorish Science Temple were armed and involved in crime, the references to Miller-El's membership in this group were related to the issue of future dangerousness. *See, e.g., Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir. 1997), *cert denied*, 522 U.S. 963 (1997).

VI. CONCLUSION

Subject to the modifications above, the Court **ADOPTS** the Magistrate Judge's Findings and Recommendations. Miller-El's Petition for Writ of Habeas Corpus is hereby **DENIED**.

SO ORDERED

DATED: June 5, 2000

BAREFOOT SANDERS
Senior U.S. District Court Judge
Northern District of Texas

IN TH. NITED STATES COURT OF APPI
FOR THE FIFTH CIRCUIT

No. 00-10784

U.S. COURT OF APPEALS
FILED
SEP 12 2001
CHARLES R. FULBRUGE III
CLERK

THOMAS JOE MILLER-EL

Petitioner - Appellant

v.

GARY L JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

---

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 8/7/01, 5 Cir., _____, _____ F.3d _____)

Before JONES, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

JURY SELECTION IN A CRIMINAL CASE

It is often said that most cases are won or lost on Voir Dire -- I agree. It is the first opportunity you have to impress the panel with your sincerity, integrity and ability. I believe in the importance of first impressions; if you can show the panel that you wear the "white hat," and if you don't destroy that illusion during the trial, then the jury will want to convict. Who you select for the jury is, at best, a calculated risk. Instincts about veniremen may be developed by experience, but even the young prosecutor may improve the odds by the use of certain guidelines -- if you know what to look for.

First and foremost, you are dealing with people, and there are no hard and fast rules governing who will be a good State's juror. Who you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the Defendant, the rules of the Court, the personality of the defense attorney, and your own individual style and judgement.

The following outline contains very little substantive law because I presume that any prosecutor is as able to look it up as I. The outline does, however, contain one prosecutor's ideas on some things that need to be said to the panel, and some things to look for in a juror.

DEFENDANT'S EXHIBIT 1 Pre-trial 3-13-86

I. Purpose Voir Dire.

- A. Legal purpose.
  - 1. To qualify jurors on law regarding case.
  - 2. To become acquainted with veniremen so that you may use your strikes intelligently.
- B. Tactical Purpose.
  - 1. Allow the veniremen to be impressed with you and your cause.
  - 2. Explain the law in the manner most beneficial to the State.

II. Preparation for Voir Dire. In many counties, the prosecutor selecting the jury will not present the evidence.

- A. Look up and learn the law regarding the particular offense to be tried.
  - 1. List and remember the elements of the offense.
  - 2. Understand and remember any definitions of words of art applicable to the offense.
- B. Be well acquainted with facts of your case.
  - 1. Learn what general law will be applicable to the facts.
  - 2. Learn all weaknesses in the case in order to prepare the jury.
- C. If you do not know the judge well, discuss Voir Dire with him in advance.

1. It will allow you to know where you stand on questionable issues so that you will not be embarrassed in front of the panel by an adverse ruling.
2. If the judge usually conducts Voir Dire himself, he may allow the lawyers to do it if asked -- this is always preferable.

III. What to look for in a juror.

A. Attitudes.

1. You are looking for a strong, stable, individual who believes that Defendants are different from them in kind, rather than degree.
2. You are not looking for any member of a minority group which may subject him to oppression -- they almost always empathize with the accused.
3. You are not looking for the free thinkers and flower children.

B. Observation is worthwhile.

1. Look at the panel out in the hall before they are seated. You can often spot the show-offs and the liberals by how and to whom they are talking.
2. Observe the veniremen as they walk into the courtroom.

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a. You can tell almost as much about a man by how he walks, as how he talks.
b. Look for physical afflictions. These people usually sympathize with the accused.

3. Dress.

a. Conservatively, well dressed people are generally stable and good for the State.
b. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a non-conformist and therefore a bad State's juror.

4. Women.

a. I don't like women jurors because I can't trust them.
b. They do, however, make the best jurors in cases involving crimes against children.
c. It is possible that their "women's intuition" can help you if you can't win your case with the facts.
d. Young women too often sympathize with the Defendant; old women wearing too much make-up are usually unstable, and therefore are bad State's jurors.

e. It is impossible to keep women off your jury, but try to keep the ratio at least seven to five in favor of men.

5. Weight. Extremely overweight people, especially women and young men, indicates a lack of self-discipline and often times instability. I like the lean and hungry look.

6. Age. People over forty are more settled and more ready to believe that criminals should be punished.

7. Race. Minority races almost always empathize with the Defendant.

8. Demeanor.

a. Attentive, intelligent looking veniremen that you are able to communicate with on Voir Dire will generally be all right.

b. Always observe how the veniremen react when being questioned by the defense attorney, and compare it to the veniremen's reaction to you.

IV. Your approach to the jury panel.

A. When the judge is talking to the panel.

1. Sit at the counsel table with your chair turned at an angle so that you can see the judge and the panel; ie, never turn your back to the panel.

2. Sit upright and have some eye contact with the panel.

B. When you are talking to the jury panel.

1. Stand upright and be as loose and at ease as possible.

2. Stand close to the panel. The further you are away, the more distant seems the communication.

3. Don't pace, but some movement may aid in keeping their attention.

4. Use your notes as little as possible.

5. Smile, be pleasant, but not too jovial; impress them with your earnestness.

V. Speaking to the entire panel.

A. Introductory.

1. Introduce yourself, tell your position, who you work for and who you represent.

2. Introduce the Defendant and his attorney(s), asking if anyone knows them either personally or by reputation. Don't dignify the Defendant by calling him "Mister", or using his first name.

3. Orient the panel (if the judge does not) as to what Court they are in, the jurisdiction of the Court (as to felony vs. misdmeanor), explain the difference and explain that your purpose is to find twelve fair and impartial people to serve on this jury -- people that

can be just as fair to the State as you know they will be to the Defendant.

a. This approach makes it appear that the State is the underdog -- most people will pull for the underdog.

b. Reasons for briefly orienting the panel.

(1) Most veniremen are ignorant of any specifics regarding the Courts and the legal procedures.

(2) It gives the panel the feeling that you are trying to aid them.

4. Explain their duties as jurors.

a. They are not expected to know the law and, the judge will give them all the law of the case in the Court's charge.

b. The jury is to determine the facts of the case, the credibility of the witnesses, and the weight to be given their testimony.

(1) The jury may believe all, any part of, or nothing that any witness says.

(2) They may look to the witness': demeanor, motive or bias, reasonableness of what is said -- using their common sense to guide them.

c. If you know that the Defendant has more witnesses than you, explain that numbers are not decisive, and they may disbelieve one hundred witnesses in favor of the testimony

of one.

B. Qualifying the panel on the general law. This is the law applicable to every criminal case.

1. Presumption of innocense.

Tell the jury:

a. All Defendants in a criminal case, no matter what they are charged with, are presumed to be innocent.

b. It is a legal presumption and just because they are presumed to be innocent does not mean that he (the Defendant) did not commit the crime.

c. This presumption lasts only until the State removes it by proving its case to their satisfaction beyond a reasonable doubt.

2. Burden of proof -- beyond a reasonable doubt. Explain that:

a. The State understands that burden and willingly accepts it, or else would not be here.

b. Though we accept our burden, we wish to be held to no higher burden, such as; beyond any doubt, or beyond a shadow of a doubt.

c. A mere discrepancy in evidence is not reasonable doubt.

d. The doubt must be reasonable, and it must be a reasonable doubt applicable to one of the elements of the offense that the law requires the State to prove to entitle it to a conviction.

3. Defendant's failure to testify.

Explain that:

a. The Defendant may call witnesses in his own behalf if he chooses, and may subpoena any witness that could help him.

b. The Defendant may testify in his own behalf if he chooses, but if he should decide not to testify, we who represent the people can not call him as a witness, and they, the jury, could not consider his failure to testify as any evidence.

c. If he should so choose to testify, they must consider his credibility; looking to his demeanor, the reasonableness of his testimony, and his motives for lying -- what he has to gain or lose.

d. Just because he is presumed to be innocent, does not mean that he is presumed to be a truth teller.

C. Qualifying the panel of the law of your case.

1. Carefully explain the elements of the offense as listed in the indictment and advise the

panel that the State must prove these things, but none other.

2. Define any words of art that are necessary to your case and distinguish the legal meaning from the usual meaning, such as:

a. "Intoxication" is not necessarily drunk.

b. "Malice" is not premeditation.

c. "Possession" is not ownership.

d. "On or about" means accessable.

e. "Assault" does not require a touching.

f. "Carnal knowledge" requires only penetration.

3. Give examples when you explain the law. The examples should be of a crime less aggravated than the one you intend to prove, so when you present your facts the jury will think it is a highly aggravated crime.

4. Qualify the panel on defensive issues.

a. The defense attorney will do this anyway, so you tell them first and in the light most beneficial to the State.

b. Circumstantial evidence.

(1) Explain that it is a type of evidence, and is different only in kind to direct evidence. Tell them that fingerprints are circumstantial evidence.

(2) Give examples of circumstantial evid-

5. Punishment.

a. This is the most important qualifying issue.

(1) In many cases the only issue is that of punishment. A case is never won unless a jury returns more time than you offer on a plea of guilty.

(2) A person weak on the maximum punishment will generally be weak on guilt.

b. Tell the jury that the State intends to ask the jury a sentence for "life" (or a substantial number of years, etc.) at the close of the testimony.

(1) This can backfire unless you have evaluated the case and know that you can ask "life" (etc.) without looking ridiculous.

(2) This is a good approach because it gives the jury time to get used to the idea of a high verdict.

(3) It allows you to argue on punishment that you have been fair with them (the jury) from the outset by telling them what you would be seeking.

c. Always stress the maximum in the range of punishment, but advise and qualify the panel on the minimum -- otherwise, you may lose your aura of extreme fairness.

d. Probation.

(1) Ask the judge to require the application for probation to be filed before jury selection so you may qualify the jury.

(2) Explain the probation law to the panel, and that just because a person may be eligible for probation, does not mean that he is entitled to probation.

(3) On heavy cases such as murder, rape and robbery, etc:

(aa) Explain that every Defendant, no matter what he is charged with falls within the probation law.

(bb) The minimum punishment, especially probation, is fertile ground for the defense disqualifying a juror for cause. Since you talk to the panel first, you can prevent the disqualification of a strong juror.

(11) Explain that they don't have to be able to think of a murder case where the Defendant may deserve probation, but if one should come along, and they thought it was the right thing to do, they could vote it.

(22) Couch the question in terms of what a "fair" person would do (no one considers themselves unfair.)

(4) Always tell the jury that the State is opposed to probation in this case.

e. Tell the panel about a bifurcated trial and that on punishment they may consider all of the evidence introduced on the guilt or innocence phase of the trial, and also the reputation, character and prior criminal record, if any, evidence of which may be admitted on the punishment hearing.

(1) The above is a true statement of the law, and any judge should allow a prosecutor to so advise the jury.

(2) Stress the words, "and prior criminal record", because it will dispell the jury's beliefs that a Defendant's record will be admitted on the guilt or innocence hearing.

f. Talk in terms of a "sentence" of life, etc., stressing the word "sentence". This will convey to the panel the fact that he will be paroled early.

g. The State has no burden of proof on punishment as it does on guilt. We need not prove beyond a reasonable doubt that the Defendant deserves any particular sentence -- it is the jury's job to make the punishment fit the crime.

VI. Questioning the veniremen individually -- this is done after addressing the panel as a whole.

A. Demeanor, preliminaries and helpful hints.

1. The questioning will progress much more smoothly if you can persuade the Court to seat the veniremen in the order that they are listed.

2. Be pleasant and respectful. Use "Yes, sir" or "Yes, Ma'am", and never talk down to a venireman.

3. Remember that the veniremen are probably self-concious; the more at ease you are with them the more they will be at ease and honest with you.

4. Never give any indication to the panel as to whom you will strike.
5. Look at the venireman's eyes and throat during your questioning (especially relating to punishment).
6. Rate your venireman from one to five in the order of his desirability.
   a. This will allow you to concentrate on the individual and his answers rather than writing.
   b. If you want a record of their answers, have someone else in Court take notes.
7. In striking your lists, be careful; more than one prosecutor has left an undesirable venireman on the jury as a result of striking the wrong name.

B. Questioning the veniremen individually.
1. Ask the length of residence in the county.
   a. People that move around very much are often unstable.
   b. If the veniremen have not lived in the county long, ask where they were born and reared.
      (1) People from small towns and rural areas generally make good State's jurors.
      (2) People from the east or west coasts often make bad jurors.

2. Who their family consists of.
   a. People with a family are generally more responsible and therefore better jurors.
   b If the venireman has children, ask their ages if the case is one involving a crime against children, or the Defendant is young.
3. Occupation.
   a. Ask a man "What is your profession or occupation?". Ask a woman "Are you employed outside the home?".
   b. Working men.
      (1) If a man is unemployed it may indicate instability.
      (2) Men who are self-made successes, or work with their hands, or work in a managerial capacity are usually good.
      (3) Technical jobs (engineers, accountants and scientists). There are two theories:
         (a) They will pick your case apart, therefore, they are bad.
         (b) They are not inclined to "chase rabbits" thrown out by defense attorneys, therefore they are good.
      (4) Intellectuals such as teachers, etc. generally are too liberal and con-

templative to make good State's jurors.

c. Working women.

(1) These women are often preferable to other women because they have had a glimpse of the cruel, hard world.

(2) Women working in retail sales often make good State's jurors.

d. Spouse's occupation is a good question because all people to a varying extent, are reflections of their spouse.

4. Ask if the venireman has any hobbies or interests that occupy their spare time.

a. Active, outdoors type hobbies indicate the best State's jurors.

b. Hunters always make good State's jurors.

5. Ask men if they have ever served in the military; if so, when, what branch of the service, their rank upon discharge and if they saw combat. Marines, master sargeants and those that have seen combat generally make good State's jurors.

6. Ask veniremen their religious preference.

a. Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused.

b. Lutherans and Church of Christ veniremen usually make good State's jurors.

c. Those that indicate that they have no religious preference are often non-conformists and bad State's jurors.

7. Ask veniremen if they have ever had a direct interest in the outcome of a criminal case.

a. This is an interest in the sense that they, or a member of their family, or close personal friend has been charged with a crime.

b. If someone volunteers, take him before the bench to illict further questions, rather than embarrass the venireman in front of the entire panel.

c. Obviously, you don't want anyone who had a close friend or relative that was prosecuted by the State.

8. Ask the veniremen if they have previously served on a criminal jury.

a. Experienced jurors usually are better for the State than the inexperienced jurors.

b. You may ask the veniremen anything about the prior case other than the verdict.

In the County of Dalla. §
§
§
State of Texas §

Affidavit of Jennifer Balido

My name is Jennifer Balido, I am a resident of Dallas County, Texas, and I am over 18 years of age and competent to give this affidavit. Having been duly sworn, I hereby state the following:

1. I was employed in the Criminal District Attorney's Office in Dallas County from October 1992 to October 1996. During my tenure in the District Attorney's Office, I represented the State of Texas in *Ex parte Joe Thomas Miller-El*, No. 31, 001-01 (Tex. Crim. App. 1996) (*per curiam*) (unpublished) in both the Court of Criminal Appeals and the trial court. *See Ex parte Miller-El*, W85-78668-L(A) (Dist. Ct. of Dallas County, 5th Criminal District Court, April 16, 1996).

2. After Applicant Miller-El filed his reply to my answer to his supplemental petition, I prepared findings of fact and conclusions of law for Judge McDowell to sign, recommending to the Court of Criminal Appeals that Mr. Miller-El be denied relief. I submitted my findings of fact and conclusions of law to Judge McDowell and his briefing attorney, Kerry Young, but I did not file them in the Dallas County District Clerk's Office or serve a copy on counsel for Miller-El, Ms. Ruth Kollman. As far as I know, Ms. Kollman was unaware I had submitted the findings and conclusions. I gave Judge McDowell the findings of fact and conclusions of law sometime after Ms. Kollman filed "Petitioner's Reply to Respondent's Answer to Petitioner's Supplemental

Petition" on March 2., .996, but I do not know on what specific date I gave those findings of fact and conclusions of law to Judge McDowell. Judge McDowell told me that he would look over the findings and conclusions and have Kerry Young look over them as well.

3. In the Criminal District Attorney's Office in Dallas County, it was routine practice and policy for our office to prepare findings of fact and conclusions of law in habeas corpus cases, and submit them to the trial court without filing them in the Dallas County District Clerk's Office or providing a copy to counsel for the applicant. It was also routine practice that if the Presiding Judge or his briefing attorney had any additions or changes that needed to be made, they would notify me and I would make those additions or changes for them. I do not specifically recall if Judge McDowell or Kerry Young made any changes or additions to the findings of fact or conclusions of law as I originally submitted to them.

4. The only materials I provided for review by Dr. Steven P. Bowers in preparation of his affidavit filed in the state habeas cases are the materials outlined in his affidavit. I do not know of any other materials that he may have reviewed.

I have read the above statement and swear, under the pain and penalty of perjury, that it is true and correct to the best of my knowledge. I give this statement of my own free will.

Jennifer Balido
Jennifer Balido

SUBSCRIBED AND SWORN to before me at Dallas, Texas this 3rd day of March, 1997.

Lena S Francis
Notary Public
my commission expires
04/14/98

This Appendix contains a photocopy of a newspaper article. A copy of the same newspaper article, printed from Westlaw, is reproduced in Appendix 11. The Westlaw copy is more legible, but does not include the photographs, charts and/or graphs that are in the photocopy.

The Dallas Morning News

Texas' Leading Newspaper — Dallas, Texas, Sunday, March 9, 1986 — 25 Sections — 75 Cents

Race bias pervades jury selection

Prosecutors routinely bar blacks, study finds

First in a series

By Steve McGonigle and Ed Timms

Staff Writers of The News

Dallas County prosecutors routinely have excluded almost nine out of 10 blacks qualified to serve as jurors, perpetuating a decades-old pattern of racial discrimination in jury selection.

Four out of five black defendants in the nation's most populous county who have gone to trial since the new method of selecting juries was put into effect in March 1985 have been tried by juries with no blacks on them.

An eight-month investigation by The Dallas Morning News has found that the constitutionally guaranteed impartial jury of their peers will be all white.

JURIES WITHOUT PEERS

Dallas County

- Prospective jurors polled: 394
- What lawyers look for: 394

The Dallas Morning News shows that prosecutors routinely manipulate the racial composition of juries through their use of peremptory challenges — legal objections that allow lawyers to dismiss prospective jurors without explanation.

District Attorney Henry Wade, however, denied that his assistants exclude prospective jurors solely because of race. Prosecutors act within the adversary legal system, Wade said, striking those people who might jeopardize "a fair trial" for their client — the people of Dallas County.

Although blacks comprise 18 percent of Dallas County's population, The News' analysis of 100 randomly selected felony trials found that less than 4 percent of jurors were black. In fact, the chances of a qualified black serving on a jury was 1-in-10, compared to a 1-in-3 chance for a qualified white.

Of those blacks struck from juries by peremptory challenges, the study found, 91 percent were barred by prosecutors. Blacks were excluded from juries at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Several legal experts characterized the findings as showing that Dallas County prosecutors are engaging in a "systematic exclusion" of black jury candidates that violates not only the defendants' right to a fair trial, but also the right of black citizens to participate equally in administering justice.

Defense attorneys contend that prosecutors, while picking what they perceive will be the most conviction-prone juries, are ignoring

Please see RACE on Page 36A.

HOW DALLAS COUNTY JURIES BECOME VIRTUALLY ALL-WHITE

Number of eligible black potential jurors called for 100 jury trials	487
Number of blacks struck by prosecutors using peremptory challenges*	405
16 Number of blacks struck by defense attorneys using peremptory challenges	
48 Number of blacks selected for juries out of 4,434 prospective jurors summoned	

* 91 of the number struck. Blacks struck... whose reasons included... [illegible]

SOURCE: Based on a three-month study of 100 consecutive felony trials in which... The 100 trials were chosen randomly.

The Dallas Morning News

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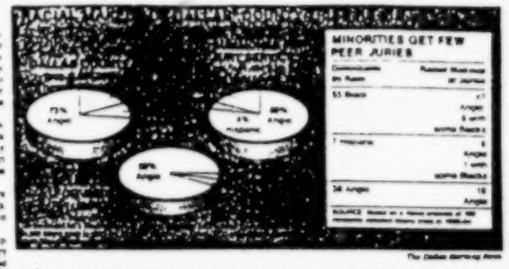
Race bias pervades jury selection, study finds



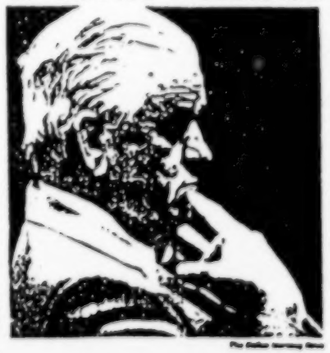
The Dallas Morning News

"I don't see that there is a good reason, and I don't think there's ever been a good reason, to systematically exclude blacks."

— Jon Sparling, former prosecutor

"I'm in shock. I thought things had gotten a lot better, but apparently they haven't."

— Larry Baraka, state district judge



The Dallas Morning News

Picking juries is an inexact science, lawyers say

By Pat Timms and Steve McGonigle
Staff Writers of The News

"It's not unusual for a prosecutor to ... leave a black or Hispanic on, especially if they are not well-educated and therefore pose no threat, because they are perceived as being the type of people who will go along with the crowd."

— Ruben Bonilla, Corpus Christi lawyer

Prosecutors routinely exclude blacks from juries

Robbery charges against Lowell Geiser were dropped in 1984 after he served 10 months in prison. Prosecutors had dismissed all of the black prospective jurors before his trial.

The Dallas Morning News/ Darren Hauck

Most blacks trust selection system, survey finds

Robert Gordon ... "It's ludicrous to think that blacks empathize with a black defendant"

JURIES WITHOUT PEERS

Race bias pervades selection of juries

Continued from Page 29A.

ard Mays.

Judges Kinkeade and Baraka, however, said judges can prevent systematic exclusion by informally telling prosecutors that they will not tolerate such behavior.

Last year, for example, Baraka said that he barred one prosecutor from selecting juries in his court when the lawyer did not give an adequate reason for excluding all black members of a jury panel.

In more than a dozen trials in Dallas and elsewhere in the state, *The News* observed only one defense lawyer complain about jury selection being racially biased. The lawyer, John Stauffer of Dallas, complained that prosecutors denied his client a jury of her peers by dismissing all eligible blacks during the jury selection.

"This is not due process, it is not constitutional, it is against God," Stauffer said after the trial.

No lawyer representing a black defendant questioned potential jurors about possible race bias before a jury was selected.

Defense lawyers in the trials said they did not raise the race issue because they did not want to anger the jury panel and because they said they did not believe even the most racist person would admit to being bigoted.

But other lawyers said they consider it critical to ask prospective jurors whether the defendant's race will affect their ability to be fair. Some lawyers say that merely raising the issue can defuse racist tendencies in jurors.

"If you have a black defendant and a white complaining witness and you don't ask about racial prejudice, you ought to have your bar card jerked that very day," said defense lawyer Richard Corbitt. "I think it's malpractice."

Still other defense lawyers say that while they do not approve of the way prosecutors exclude minorities with peremptory challenges, they do not want to risk losing their ability to dismiss whomever they choose.

Judge Baraka said racially discriminatory jury selection is not strictly a legal issue. "Morally, it's wrong because black people are people, and they pay these people's salaries with their tax dollars.

"They (prosecutors) are supposed to be protecting the interests of all citizens. And how can they protect their interests if you won't take them into the system?"

Defense lawyer Henry Ackels noted that laws can change.

"It wasn't until 1963, 175 years after the Constitution was adopted, that the courts said everybody has a right to have a lawyer . . . It wasn't until Brown vs. Board of Education that the courts decided everybody had a right to an equal education," Ackels said.

"Sometimes, it takes 200 years before we start waking up to a constitutional right that we've had all the time."

This Appendix contains the text of a newspaper article, printed from Westlaw. A photocopy of the same newspaper article is reproduced in Appendix 10. The photocopy is less legible, but includes photographs, charts and/or graphs which are not included in this Appendix.

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3/9/86 DALLASMN 1A DALLASMN
3/9/86 Dallas Morning News 1A
1986 WL 4309035

The Dallas Morning News
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Sunday, March 9, 1986

NEWS

RACE BIAS PERVADES JURY SELECTION Prosecutors routinely bar blacks, study finds Series: DISCRIMINATION IN JURIES

Steve McGonigle, Ed Timms
1986, The Dallas Morning News

Dallas County prosecutors routinely have excluded nine out of 10 blacks qualified to serve as jurors, perpetuating a decades-old pattern of racial discrimination on felony juries.

For four out of five black defendants, the selection process means that the constitutionally guaranteed impartial jury of their peers will be an all-white jury.

An eight-month investigation by The Dallas Morning News shows that prosecutors routinely manipulate the racial composition of juries through their use of peremptory challenges -- legal objections that allow lawyers to dismiss prospective jurors without explanation.

District Attorney Henry Wade, however, denied that his assistants exclude prospective jurors solely because of race, although he acknowledged that race may be a factor in whom they dismiss. Prosecutors, Wade said, act within the spirit of the adversary legal system to exclude anyone if they believe it will give their client -- the people of Dallas County -- "a fair trial.'

While blacks comprise 18 percent of Dallas County's population, The News' analysis of 100 randomly selected felony trials found that fewer than 4 percent of jurors were black. In fact, the chance of a qualified black serving on a jury was 1-in-10, compared to a 1-in-2 chance for a qualified white.

Of those blacks struck from juries by peremptory challenges, the study found, 92 percent were barred by prosecutors. Blacks were excluded from juries at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Several legal experts characterized the findings as showing that Dallas County prosecutors are engaging in a "systematic exclusion' of

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black jury candidates that violates not only the defendants' right to a fair trial, but also the right of black citizens to participate equally in administering justice.

Defense attorneys contend prosecutors, while picking what they perceive will be the most conviction-prone juries, are ignoring their legal duty to uphold justice.

"I think that the black population, being a significant portion of Dallas County, is being totally discriminated against, and if I were a black person I'd be up in arms about it,' said Dallas defense lawyer Kerry FitzGerald, head of the Texas Criminal Defense Lawyers Project.

Wade, Dallas County's chief prosecutor for 35 years, said that in some cases, he believes blacks may be "more likely' to convict defendants than those who actually are selected for juries.

"I'm frankly trying to get more on (juries),' Wade said of blacks. "We don't take them on just to balance the jury.'

City Council member Al Lipscomb, an outspoken critic of jury selection in Dallas County, charged that prosecutors are using "racist tactics' that alienate blacks from the judicial system.

"The criminal justice system itself should be indicted here in Dallas for tampering with the law, for tampering with the rights of citizens,' said Lipscomb, one of two black members on the City Council.

The U.S. Supreme Court has ruled that systematic exclusion of an identifiable group of potential jurors is unconstitutional. It has reversed criminal convictions on such grounds -- including three cases from Dallas County in the 1940s in which racial bias in the selection of grand jurors was alleged.

FitzGerald contended that "stacking' the racial makeup of juries denies defendants of all races their constitutional right to have their fates determined by a representative cross section of the community.

Increasingly, similar arguments are being voiced throughout the nation. Supreme courts in four states and three of the 11 federal circuit courts of appeal, for example, have modified peremptory challenges because of concern about their racially biased use by prosecutors.

In Texas, prosecutors and defense lawyers each have 10 peremptory challenges in non-capital felony trials. The peremptory challenge

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allows lawyers to cull prospective jurors without having to give cause.

The U.S. Supreme Court is studying the "cross section argument' -- that defendants have a right to a trial by a representative section of the community -- in a Kentucky case to decide whether to modify a controversial 1965 decision that permits racially based peremptory challenges in individual cases.

The court stated in Swain v. Alabama that a prosecutor's use of his peremptory challenges is not unconstitutional unless he uses them "in case after case' to exclude blacks for no reason related to any trial strategy.

Critics of Swain contend that it gives prosecutors free rein to exclude blacks and imposes an impossible burden on defendants to prove unconstitutional exclusion because of the lack of records identifying potential jurors by race.

Arch McColl, president of the Dallas County Criminal Bar Association, said The News' study exemplifies the type of race discrimination by state action that the high court consistently has condemned. It also demonstrates, McColl said, that prosecutors still adhere to jury selection guidelines suggested in a controversial 1969 paper.

The paper, written by then-Assistant District Attorney Jon Sparling, noted that minorities "almost always empathize with the accused' and therefore do not make good jurors for the prosecution.

"You are not looking for a fair juror,' Sparling advised in the paper, which later was made part of a manual for Texas prosecutors, "but rather a strong, biased and sometimes hypocritical individual who believes that defendants are different from them in kind rather than degree.'

Sparling, now a candidate for the Republican nomination for district attorney, said he was repeating "the conventional wisdom of the time' and that he no longer believes the guidelines are valid.

"I don't see that there is a good reason, and I don't think there's ever been a good reason, to systematically exclude blacks,' Sparling said.

State District Judge Larry Baraka, a former prosecutor and the county's first black felony court judge, said The News' findings also demonstrate the failure of judges and defense lawyers to stop the exclusion of qualified blacks from jury service.

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"I'm in shock,' Baraka said. "I thought things had gotten a lot better, but apparently they haven't.'

Wade said his assistants are trained to use their peremptory challenges to dismiss potential jurors they believe will empathize with the defendant. He said, however, that not all his assistants may use their peremptory challenges intelligently.

"You're trying to get either a completely unbiased juror or one that may be biased in favor of the state,' said Wade, who is not seeking re-election. "And I suspect a lot of those (blacks) being cut would probably be better jurors than the ones they end up with.'

Wade suggested that the high rate of black exclusion revealed in The News' study might stem from a disproportionately large number of blacks who express doubt about assessing maximum punishments or who have personal knowledge of criminal cases.

Wade said he was not convinced by The News' findings that his assistants engage in an illegal, systematic exclusion of blacks. "It indicates, maybe, that,' he said.

The News' study is based on a computer analysis of Dallas County court records from 100 felony jury trials conducted during 1983 and 1984. The trials were selected at random from among the 1,036 trials held during that period.

The study examined records on 4,434 prospective jurors to determine the racial composition of juries, as well as the race of persons excluded from jury service by judges, prosecutors and defense lawyers.

Among the major findings of the study are:

*Juries in 72 of the 100 trials had no blacks. Of the 28 juries with black members, eight sat in judgment of black defendants while 20 decided the fate of Anglo and Hispanic defendants.

*Only two of 54 black male defendants included in the study were tried by juries that had black males. None of the seven male Hispanic defendants had a male Hispanic juror. All 38 Anglo defendants had a majority of Anglos on their juries.

*Of those blacks eliminated from jury service by peremptory challenges, 92 percent were struck by prosecutors. Four percent were excluded by defense lawyers, and 4 percent were dismissed by both sides. (Neither side knows the other's challenges until the judge receives them at the end of the preliminary examination.)

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*Forty-seven Hispanics and 46 blacks served on juries, although the number of blacks summoned for jury duty was five times greater than the number of Hispanics.

*The percentage of blacks disqualified from jury service by judges was 1 1/2 times the percentage of disqualified Anglo or Hispanic jury candidates. However, blacks were excluded by prosecutors at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Prosecutors maintain that blacks themselves are partly responsible for their underrepresentation on felony juries because many disqualify themselves by saying they cannot judge others or consider a life sentence in cases where state law provides such punishment upon conviction.

Under Texas law, prospective jurors who say they cannot follow the law because of personal convictions or bias are disqualified for "cause.'

After those disqualified are dismissed by the judge and both sides exercise their peremptory challenges, the first 12 people who remain are chosen to sit on the jury.

Peremptory challenges, in varying forms, have existed since the 13th century in English law. Historically, they were granted only to the defense in a criminal case. It has been in the last century in the United States that prosecutors were granted the right to exercise such challenges.

Defense lawyers argue that the use of peremptory challenges by Dallas County prosecutors to exclude blacks from juries stems from a racial stereotype that blacks are less inclined to convict and assess harsh penalties.

The stereotype has been passed from generation to generation of prosecutors and is particularly acute in Wade's office, defense lawyers say, because of its heavy emphasis on conviction rates as the means for earning promotion.

"You don't get hired unless you can play that game, and you certainly don't progress,' said Vincent Perini, president of the Dallas Bar Association.

"What they are, really, is a bunch of SMU frat rats who are, you know, putting in a little postgraduate work down there kicking nigger ass before going on to the real world, the respectable world, the Dallas Country Club and the civil law firm,' Perini said.

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Norman Kinne, one of Wade's top three felony prosecutors and a member of his staff for 14 years, strongly denied Perini's characterization of the district attorney's staff.

"I can't believe the elected president of the Dallas Bar Association, in one fell swoop, manages to insult Southern Methodist University, fraternities, the black race, the Dallas Country Club and all civil law firms,' Kinne said.

"However, we have tried over the years to provide, under Mr. Wade's guidance, professional prosecution of which all citizens may be proud. The record of this office and the quality of life in Dallas speaks for itself.'

Baraka said stereotyping blacks as being less inclined to convict and assess tough sentences is "absurd.'

"Skin color has nothing to do with the process of your damn brain,' he said.

Defense lawyers say the practice of excluding blacks has diminished as the number of black prosecutors in Wade's office has increased, but they say that even black prosecutors succumb to the pressure to win at all costs. Eight of the 42 felony court prosecutors on Wade's staff are black.

Black lawyers, in particular, maintain that blacks, more than whites, have more reason to dislike criminals because of the higher crime rate in the black community.

"People, be they black, white or brown, are tired of crime; they're just tired of it,' said Royce West, a black former prosecutor and a Democratic candidate for district attorney. "I think that when blacks and browns are systematically included on juries that they will give stiffer punishments.'

Added defense lawyer Frank Hernandez: "Blacks, Mexican-Americans, women are just as tough, if not tougher, on a defendant who meets their minority status because they look upon that person with some sort of anger sometimes: "You are causing our whole group to be looked upon in this (bad) way.'

"Just because you're black doesn't mean that if the defendant is black he gets away,' said Hernandez. "Blacks don't like to be shot at in 7-Elevens any more than anybody else. Nor do Hispanics like to be burglarized.'

The practice of prosecutors excluding blacks is so commonplace that defense lawyers say they routinely incorporate it into their

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trial strategy, rarely dismissing even prosecution-minded blacks, anticipating that prosecutors will use one of their peremptory challenges to do the job for them.

In The News' study, only 3.3 percent of the peremptory challenges exercised by defense lawyers were against blacks; 2.5 percent were against Hispanics. Ninety-four percent of the defense strikes were exercised against Anglos.

Dallas County Public Defender Ralph Taite said he routinely warns black clients that they will likely face "a white jury composed of housewives, sometimes rednecks, a lot of middle-class people who come from the suburbs, who have very little contact with them.'

"There's not going to be anybody on that panel who's going to be able to say, "Yeah, that's the way it is over in South Oak Cliff, or South Dallas, or West Dallas,' ' Taite said.

The only time blacks get on a jury, defense lawyers contend, is when there are too many white non-conformists who appear to prosecutors to be even worse risks.

"You get about 12 hippies and 14 painted-up women and a bunch of cab drivers and bartenders, and they (prosecutors) will be inclined to take chamber of commerce-type blacks -- you know, business-looking, good background with job,' said veteran defense lawyer Charles Tessmer.

Defense attorney Richard Aguire said The News' findings that Hispanics serve on juries in a greater proportion than blacks confirms observations that prosecutors prefer Hispanics over black jurors.

The reason, Aguire said, is that prosecutors believe Hispanics will follow the lead of the Anglo majority on a jury. According to defense lawyers, prosecutors also believe that Hispanics will not favor black
defendants because of what prosecutors perceive as historical antipathy.

Members of the judicial system argue the impact that exclusions of minorities have on sentencing, but many agree that the practice has a wide-ranging impact on the appearance of justice in Dallas County.

The threat of an all-white jury prompts some black defendants to waive their right to a trial and seek a plea bargain, lawyers say; other defendants change their pleas after learning that their jury contains no member of their race.

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"Black people don't like to go to trial, regardless . . . .They don't believe they're going to get a fair trial from white people,' explained defense lawyer Carl Gaines, the second black prosecutor hired by Wade.

Nor does the impact of black exclusion stop with defendants. Blacks called for jury service say the absence of blacks on juries causes them to question whether the judicial system is color-blind.

Many families of defendants leave the courtroom believing they have witnessed "white man's justice,' said Peter Lesser, a defense attorney and a Democratic candidate for district attorney.

"I think that hurts the judicial system because then they're not concentrating on the fact that Johnny is a no-good scumbag who beat up this old lady, stole her purse, put her in the hospital and nearly killed her,' Lesser said. "They're concentrating on the fact that, well, it's racist.'

Jessica Guillory was one of nine black potential jurors summoned in February for a case involving a black woman charged with welfare fraud. Mrs. Guillory said she felt intimidated after watching the panel reduced to an all-white jury.

"It made me know that I better not ever get in trouble, that I don't feel like justice is all it's supposed to be,' said Mrs. Guillory, one of six blacks dismissed by the state.

Baraka said blacks have been so conditioned to expect unfairness from the justice system that many do not consider jury service a possibility.

"As a defendant, we don't stand a chance. We're arrested more often, we're convicted more often, we receive more punishment. I mean, those are just the facts,' Baraka said. "And as honest, law-abiding citizens who believe in God and the American way and pay taxes to send our children to school, we're still told we're not anything of value.'

West, a defense attorney, said that even black professionals contemplate ignoring a jury summons, believing that because of their race, their opinions are not wanted by the justice system. "There's no sense going down there (to the courthouse) because they're going to strike them just because they are black,' West said.

Still other blacks have a more visceral reason for avoiding jury service, according to state District Judge Ed Kinkeade, who oversees operation of the central jury pool.

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"They tell me, "I'm afraid of the courthouse; nothing good happens at the courthouse, and I don't want to be a part of it,' ' Kinkeade said.

Racial discrimination in jury selection in Dallas County dates back at least to the 1930s when riots narrowly were averted after blacks appeared at the courthouse, insisting they be considered for jury service. In 1938, a black college president was thrown head-first down the courthouse steps by two white men when he refused to leave the central jury room.

In the 1940s, the U.S. Supreme Court, in three separate cases, told Dallas County that its method of selecting grand jurors was unconstitutional because it intentionally excluded blacks.

Evidence presented to the Supreme Court in one Dallas case in 1942 showed that no black ever had served on the Dallas County grand jury. Two grand jury selection officials said they had not summoned any blacks because they knew of no qualified black in the county, which then had 55,000 black residents.

The law was then the most common form of exclusion. Most blacks were simply disqualified from jury service because, in order to be an eligible juror, a person must have paid a poll tax -- a required fee for voting -- and be a property owner.

Blacks who did qualify for jury service in Dallas County were rarely served with summonses; those who were served and appeared at the courthouse frequently were told by judges that their services were not needed.

Not until 1947 did a black serve on a trial jury in Dallas County, 81 years after blacks were granted full rights as citizens by the 14th Amendment to the U.S. Constitution.

When Wade took office as district attorney in January 1951, he said, he made it a priority of his office to prosecute more crimes against blacks, because of the higher crime rate in predominantly black neighborhoods. That policy has remained a priority ever since, Wade said.

However, Wade said he has never had a policy of preventing blacks from serving on juries and has seated blacks on juries as far back as the 1950s.

But state District Judge Jack Hampton, who served on Wade's staff from 1958 to 1962, recalled being reprimanded by Wade when he allowed a black woman to serve as a juror on a misdemeanor drunken driving case. The case ultimately ended in a mistrial because the woman

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could not reach a verdict.

" "If you ever put another nigger on a jury, you're fired,' ' Hampton quoted Wade as saying. "That was the way things were back in 1958.'

Said Wade: "That didn't happen, so far as I'm concerned.'

Hampton said he did not put another black on a jury for the remainder of his career as a prosecutor.

Five years later, a treatise on jury selection credited to Assistant District Attorney Bill Alexander, then one of Wade's top aides, reiterated the belief that certain minorities were not appropriate state's jurors.

"Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated,' Alexander advised prosecutors. "I may like these people, but they will not do on juries.'

Alexander, now a federal prosecutor in Dallas, said he accepted blacks as jurors when he was in Wade's office and does not remember writing the treatise that advised against selecting minorities. "I just won't take responsibility for that,' he said.

In 1963, when the treatise appeared, the number of blacks appearing for jury duty remained small. But by the end of the decade, that number was increased significantly with the abolition of the state poll tax in 1966 and the advent of a new law designating voter registration lists as the source lists for juries.

It was then, according to defense lawyers, that prosecutors began in earnest to exercise their peremptory challenges against blacks.

In 1969, Sparling, then an assistant district attorney, delivered what became a highly publicized speech to a training session for prosecutors. Sparling's suggestions on jury selection, in fact, were the subject of a Time article in 1973 that carried the headline: "Women, Gimps, Blacks, Hippies Need Not Apply.'

In addition to minorities, Sparling's recommendations warned against selecting "free-thinkers,' people with physical afflictions and the overweight -- especially women and young men.

Wade and his assistants maintain the Sparling manual never was followed blindly and never has been read by most current prosecutors. They insist that prosecutors are trained to make individual decisions on jurors based on a combination of demographic factors and personal

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observations.

"Why do I want 12 white people on a jury when one of them is a person who's been unemployed for a while or not much of a work record, and came to court without a coat and tie, and you struck this young black business executive just because he was black?' said Jerry Banks, formerly one of Wade's top assistants. "That's dumb.'

Any prosecutor who allowed his racial prejudices to interfere with his judgment in selecting the best possible jury, Banks said, would not
have lasted long in Wade's office.

Defense lawyers claim that prosecutors with the least experience are the most likely to rely on stereotypes handed down by more experienced prosecutors.

"If Douglas MacArthur wrote his memoirs on the campaign in the South Pacific and you wanted to be a great general, what would you do?' asked Aguire, a former prosecutor. "If you're an inexperienced prosecutor, you do what the old master says.'

The process of culling black jury candidates is apparent almost every Monday in the Dallas County Courthouse. Dozens of blacks, along with other potential jurors, enter the central jury room and later are sent to a felony court for jury questioning. But when the jury is seated, blacks more often than not are left sitting in the audience.

Inside the courtroom, prosecutors commonly exercise peremptory challenges against blacks who voice similar views and appear to possess similar qualifications to whites who are selected on the jury.

The News witnessed prosecutors repeatedly dismissing black professionals in favor of blue-collar whites, even though the whites may not have lived in the county as long. The practice was particularly pronounced when the defendant was black.

Selecting a jury, lawyers agree, is part gamesmanship and part psychology, with each sides attempting to guess how the other will use its 10 peremptory challenges to sculpt a jury of people most inclined to favor its side of the case.

And while the intent behind the law allowing peremptory challenges is to obtain an impartial jury by eliminating signs of partiality, lawyers on both sides scoff at the notion that fairness motivates their use of the challenges..

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"Anybody who tries to sugar-coat it by talking about fairness and justice and equality is just talking through his hat,' said defense lawyer Mel Bruder. "We want people who are going to look at that case with prejudiced eyes.'

The means of identifying potentially hostile jurors can be as straightforward as listening to candidates' responses to questions, or as subtle as observing the quickness of the person's gait or the style of his hair.

Stereotypes, superstitions and instincts are integral parts of the selection process, lawyers admit, because of the limited time available to question potential jurors and the sparse biographical information provided on each candidate.

Opinions on whom to exclude are not scientific.

Alexander, one of Wade's former top assistants, for example, promulgated a policy that came to be dubbed "The Alexander Rule.' It advised prosecutors to exclude any person whose profession begins with the letter "p' -- including plumbers, painters, prostitutes and pimps. Alexander also advised against selecting "Yankees . . . unless they appear to have common sense,' "queers' and "anyone who has ever lived in California.'

Defense lawyer Tom McCorkle, a native of Highland Park, said he habitually uses peremptory challenges on persons belonging to any group "I loathe.'

"Republicans and people from the Park Cities, my own flesh and blood, you know, I wouldn't have on a jury,' McCorkle said. "I'm prejudiced about that, have bad feelings about them.'

Other defense lawyers say they routinely use their peremptory challenges to exclude police officers, retired military personnel, bankers and Lutherans, all of whom traditionally are viewed as prosecution-oriented. They say they look for open-minded people and "virgin jurors' untainted by exposure to the judicial system.

Prosecutors, on the other hand, say they look for conservative people with a stake in the community. Indicators of stability, they say, are a person's job, his family makeup and his personal appearance.

The current instructional manual given prosecutors by the Texas District and County Attorneys Association suggests that it is not advisable to select potential jurors with multiple gold chains around their necks or those who appear to be "free thinkers.'

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What distinguishes defense practices from prosecution practices, according to defense lawyers, is that prosecutors use their legally constituted peremptory challenges to accomplish an illegal result -- the disenfranchisement of blacks from jury service and the perversion of the guarantee of a jury of peers.

The result, they maintain, is that justice is skewed because an entire segment of the community is prevented from voicing its opinions on what constitutes justice in any individual criminal case.

The absence of blacks, lawyers say, deprives juries of a variety of perspectives and insight into human behavior, sometimes forcing white jurors to rely on stereotypes and biases in determining the fate of defendants.

"They are incapable of empathizing and unlikely to sympathize,' defense lawyer Tim Banner said of all-white juries. "They haven't lived inside a black skin. They don't know what it's like.'

The racial composition of a jury can be particularly critical in cases in which the state's evidence is primarily circumstantial, such as the identification of eyewitnesses.

Defense attorney Ed Sigel represented E-Systems engineer Lenell Geter in a celebrated armed robbery case that raised the specter of racial prejudice in the Dallas County's justice system. Sigel contended that white witnesses had more credibility with Geter's all-white jury than Geter, a black.

Every black eligible to serve on Geter's jury was dismissed by prosecutors, Sigel said.

"What they thought was, Geter was just another black young fellow that was out robbing,' Sigel said. "There's no question in my mind that if he were a white engineer, they would not have dealt so harshly with him and they probably would not have found him guilty. They would have listened to the evidence.'

Geter was found guilty of armed robbery and sentenced to life in prison. However, he was released after the district attorney's office agreed to give him a new trial, based on allegations of irregularities in his trial. Ultimately, all charges against Geter were dropped, after eyewitnesses identified another black man as the robber.

Racial makeup also can affect the tone of deliberations.

Defense lawyer Ron Goranson recalled a recent trial in which he defended a black man accused of murder, and overheard one member of

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the all-white jury discussing potential punishment for his client.

"Look, I already agreed with you not to find the nigger guilty of murder,' Goranson quoted the man as telling his fellow jurors, "but I'm not going to let you talk me into giving him probation.'

Opinions about the effects of a jury's racial composition on the verdict rendered are almost as varied as the opinion-givers. Some defense lawyers contend all-white juries tend to punish black defendants more severely; some say white juries are not as tough, particularly in crimes among blacks.

Most judges say juries, regardless of the racial makeup, almost always "do the right thing.'

Texas criminal case law shows that few cases have raised the issue of race-biased jury selection on appeal. In cases that have raised the issue, state appeals courts did not find reversible legal error. Those cases that have been overturned have been reversed by federal appeals courts.

Trial court judges acknowledge that the practice of prosecutors excluding blacks is common, but they contend that they have no authority to interfere with the exercise of peremptory challenges.

"A judge has no role in directing the prosecutor or the defense lawyer to do their peremptory challenges, or not do their peremptory challenges, in a particular manner,' said state District Judge Richard Mays.

Kinkeade and Baraka, however, said judges can prevent systematic exclusion through informal means by telling prosecutors they will not tolerate such behavior.

Last year, for example, Baraka barred one prosecutor from selecting
juries in his court, he said, when the lawyer did not give an adequate reason for excluding all black members of a jury panel.

In more than a dozen trials in Dallas and elsewhere in the state, The News observed only one defense lawyer complain about jury selection being racially biased. The lawyer, John Stauffer, complained that prosecutors denied his client a jury of her peers by dismissing all eligible blacks from the jury panel.

"This is not due process, it is not constitutional, it is against God,' Stauffer said after the trial.

No lawyer representing a black defendant questioned potential

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jurors about possible race bias before a jury was selected.

Defense lawyers in the trials said they did not raise the race issue because they did not want to anger the jury panel and because they said they did not believe even the most racist person would admit his bigotry.

But other lawyers said they consider it critical to ask prospective jurors whether the defendant's race will affect their ability to be fair. Some lawyers say that merely raising the issue can defuse racist tendencies in jurors.

"If you have a black defendant and a white complaining witness and you don't ask about racial prejudice, you ought to have your bar card jerked that very day,' said defense lawyer Richard Corbitt. "I think it's malpractice.'

Still other defense lawyers say that while they do not approve of the way prosecutors exclude minorities with peremptory challenges, they do not want to risk losing their ability to dismiss whomever they choose.

"It goes back to the old, old quote out of the (Texas) Court of Criminal Appeals. He may strike as many blows as he wants but they must be fair blows,' said Bruder, a Dallas defense attorney.

"And if all he (the prosecutor) is doing is striking blows for the state by excludo I don't think are going to do a good job for my client -- I'm in a hard position to criticize him for it,' Bruder said.

Baraka said racially discriminatory jury selection is not strictly a legal issue. "Morally, it's wrong because black people are people, and they pay these people's salaries with their tax dollars.

"They (prosecutors) are supposed to be protecting the interests of all citizens. And how can they protect their interests if you won't take them into the system?'

Defense lawyer Henry Ackels noted that laws can change.

"It wasn't until 1963, 175 years after the Constitution was adopted, that the courts said everybody has a right to have a lawyer . . . .It wasn't until Brown v. Board of Education that the courts decided everybody had a right to an equal education,' Ackels said.

"Sometimes, it takes 200 years before we start waking up to a constitutional right that we've had all the time.'

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1- 2 CHARTS (Credit:The Dallas Morning News *
Source:Based on a News analysis of 4,434 prospective jurors called for potential service in 100 felony trials in 1983-84. The 100 trials were chosen randomly.) 1.HOW DALLAS COUNTY JURIES BECOME VIRTUALLY ALL-WHITE 2.RACIAL MAKEUP OF DALLAS COUNTY TRIAL JURIES **PHOTOS** 1.Jon Sparling (No credit given) 2.Larry Baraka (No credit given) 3.District Attorney Henry Wade denies that his assistants use race as the sole factor in excluding people from juries.(Credit:The Dallas Morning News) 4.Robbery charges against Lenell Geter were dropped in 1984 after he served 16 months in prison. Prosecutors had dismissed all of the black prospective jurors before his trial. (Credit:The Dallas Morning News/David Woo) ; LOCATION: Charts - NR. Photos: 1. Sparling, Jon. 2. Baraka, Larry. 3. Wade, Henry. 4. Geter, Lenell.

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NEWS

MOST BLACKS TRUST SELECTION SYSTEM, SURVEY FINDS

Steve McGonigle, Ed Timms
The Dallas Morning News, 1986

Although almost all of them were excluded from Dallas County juries, two out of three blacks surveyed by The Dallas Morning News maintain faith in the jury selection system, and half believe it affords every person an equal chance to serve.

In a survey of 192 blacks -- all of whom were summoned for jury duty in 1983 and 1984 -- 15 percent said they believed race played a role in the selection process. Race also was the most common explanation given by those who claimed that the selection process was not fair.

Two jury consultants said The News' findings reveal a degree of trust in the jury selection system that belies the stereotype that black jurors are more sympathetic to minority defendants.

"Black people, much to the surprise of those who distrust them from the state's point of view, actually identify with the system and want it to endure,' said Robert Gordon, a forensic psychologist and lawyer.

Gordon and psychologist Leon Peek, who publish a monthly poll of attitudes of prospective jurors in Dallas County, said prosecutors and defense lawyers are foolish to rely on the stereotype as an indicator of who makes good jurors.

"It's naive to think that blacks empathize with a black defendant,' Gordon said.

The News' survey is based on telephone interviews conducted from Feb. 27 to March 3. Fifty-eight percent of the respondents were women, 71 percent were between the ages of 35 and 64, and 3 percent were unemployed.

Eighty percent of those surveyed said they were not chosen as

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jurors the last time they were summoned. Sixty percent of those said they did not know why they were not selected, and 5 percent believed race was the reason.

Gordon and Peek said they were surprised that 65 percent of those surveyed expressed faith in the jury selection system and 31 percent said they believed every defendant received fair treatment.

Sadie Mae Brown, 64, a maid who was selected as a juror in an attempted murder case, said: "I don't think it made any difference what color people were. Everybody was real nice to each other.'

Gordon said the positive attitudes represent an important social change.

"This tells me that we've come a long way from the '60s in terms of whether a black person feels alienated from the system or has access to the system,' said Gordon. "Whether, in fact, the black person has access to the system, they believe that they have access to it.'

Peek noted that the attitudes expressed in The News' survey reflect the middle-class status of the vast majority of respondents.

"There will be a group in the black and Hispanic communities that don't have faith in the criminal justice system, who fairly strongly believe that the most important single item attendant to a black prospective juror is the color of their skin,' Peek said.

"These are the same people, though, who also are going to be disenchanted with our whole governmental system and are not going to register (to vote).'

About one-third of the respondents expressed disenchantment when asked about specific reasons for people being excluded from jury service.

The four factors cited most often as a reason for being excluded from jury service were: being black, Hispanic, poor or younger than 35.

"They don't want us on criminal cases, especially if the defendant is black,' said Dallas postal worker Billy Barry, 39, during his interview with The News.

Dallas minister Frank Sowells, 54, pastor of the Eastside Church of God in Christ, said he had "no faith at all' in the system's ability to remain colorblind in selecting juries.

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"They seem to think that blacks have no fair judgment, so they seem to want all-white juries,' said Sowells, who has been summoned for jury duty three times without serving as a juror.

"They say you're supposed to get a jury of your peers,' said Louis Ford, 46, a Dallas teacher. "How is it a jury of your peers for a poor, young black man when he's tried by an all-white jury? When you're poor, you lose.'

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PHOTO (No credit given) Robert Gordon ; LOCATION: Gordon, Robert.

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Sunday, March 9, 1986

NEWS

PICKING JURIES IS AN INEXACT SCIENCE, LAWYERS SAY Series: DISCRIMINATION IN JURIES

Ed Timms, Steve McGonigle

"Boots and bellies and tattoos' are what Corpus Christi defense attorney Doug Tinker looks for in a jury when his client is accused of driving while intoxicated.

A manual for prosecutors, circulated throughout the state, suggests that a potential juror "who was a sniper for the Marines in World War II . . . probably would have very little difficulty voting in such a way that the death penalty will be assessed.'

Marshall defense attorney Ned Dennis doesn't want business executives or schoolteachers on his juries, and avoids preachers "like the plague.'

While lawyers may disagree on who makes good jurors, they are perhaps unanimous on two points: Jury selection is an inexact science, and it can have far-reaching consequences. Some, in fact, believe the outcome of a case may well be decided by the time the jury is picked.

"For the state, if you could get 12 Nazi U-boat captains, you'd probably do all right,' said Steve Capelle, executive director of the Texas District and County Attorneys Association. "When I was a defense lawyer . . . if I could get a bunch of UT students or a bunch of professors, I'd probably do all right, too.'

In felony trials, both prosecutors and defense attorneys can, with peremptory strikes, bar up to 10 people from serving on a non-capital felony jury without giving any explanation. These peremptory challenges are the tool that determines a jury's texture, forming a union of diverse personalities and backgrounds held together only by the obligations of an oath.

Few law schools offer extensive training in jury selection. The process can be very brief, or it can involve extensive questioning,

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observation before the prospective jurors are brought to a courtroom, and even psychological profiles. Lawyers rely on strategies they have formulated through trial and error or by copying the methods of more experienced practitioners.

Stereotypes abound on both sides. Among prosecutors, for example, one widely accepted view is that minorities don't make good jurors. Defense attorneys often are wary of conservatives in thought and dress.

"Defense attorneys want the most liberal people on juries they can find,' said Arthur "Cappy' Eads Jr., Bell County district attorney and president of the National District Attorneys Association. "Now, if in a defense attorney's mind a minority is liberal, he wants him on the jury.'

But if a black or Hispanic doesn't get on the jury, Eads added, the defense attorney "cries foul.'

Austin defense attorney Roy Greenwood notes that in most felony cases, the prosecutors and the jurors will be white. Odds are, though, the defendants will be Hispanics or blacks.

From the prosecutor's standpoint, Greenwood said, "Why take a chance of a juror who is Hispanic or black getting on . . . who is intelligent enough to fudge his way through the questions during voir dire (questioning of prospective jurors) and then hang the jury? They don't want to take that chance. They don't want that racial sympathy.'

And Greenwood admitted thPO defense attorneys do the same thing. "He's going to try to get as many blacks on there as he can, and try to strike rednecks, military people,' he said.

Harris County District Attorney Johnny Holmes said prosecutors should base their peremptory strikes not on race but on each individual's background and experiences.

Holmes suggests that many minorities in the state, because of past oppression, might look at a police officer's testimony "with a great deal of chagrin' because either they know someone or have themselves seen "some officer bending the truth.' Those minorities would not be good jurors, he said, because of the possibility of residual hostility toward law enforcement figures -- not because of their race.

"Blacks seem to have had . . . more than their share of run-ins with the law, and as a result they view the legal system with a little more jaundiced eye,' said Teague defense attorney Ricky Sims.

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"You take your regular, middle-class, white Anglo-Saxon Protestant, and he views the police as basically good, honest people who are out there doing a good job. And if they bring somebody in, by God, they're guilty.

"The black community views the police officer as basically a redneck that is there to blame them for everything that goes wrong on every occasion and may take them in for things they might not necessarily have done or in their view may have had good reason for doing.'

If all blacks are kept off the jury, Sims said, a black defendant "is not going to get as objective a trial.'

Tinker, recognized by many attorneys as a master of jury selection, said he is convinced that prosecutors may be making a mistake by striking all blacks.

"Many times it's a black person who is a good citizen, a responsible citizen, a voter. He doesn't like the image that the criminal black gives to him.'

Said Warren Burnett, a veteran defense lawyer with offices in Odessa and Galveston: "It happens frequently that black people who are living in high-crime areas, and who beyond all others want the laws strictly enforced, are the objects of peremptory challenges by prosecutors.'

Tinker said that frequently, through the process of elimination, people get on a jury who do little more than occupy space.

"We call them rugs -- there are people you can take on juries that we figure don't make any difference. You end up with the four or five that really make the difference,' he said.

Ruben Bonilla, a Corpus Christi attorney and former president of the League of United Latin American Citizens, said prosecutors have developed new strategies in counties where the minority population is so large that all cannot be removed from a jury with peremptory challenges.

"It's not unusual for a prosecutor to . . . leave a black or Hispanic on, especially if they are not well-educated and therefore pose no threat, because they are perceived as being the type of people who will go along with the crowd,' Bonilla said.

"They're not going to create any waves in that jury room when you have a strong Anglo dominating-type personality as foreman.'

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3/9/86 DALLASMN 29A

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This Appendix contains a photocopy of a newspaper article. A copy of the same newspaper article, printed from Westlaw, is reproduced in Appendix 13. The Westlaw copy is more legible, but does not include the photographs, charts and/or graphs that are in the photocopy.

sunday

Chance of rain
High in 40s Low in 40s
Details on Page 42A

DALLAS LIFE

Good ol' tale for Christmas

SPORTSDAY

Plano 24, La Marque 7
Stark 21, McKinney 9
Section B

HIGH SCHOOL PLAYOFFS

Jefferson 24 . . . . . Cuero 0
Shiner 18 . . . . . Mart 0

Georgia Tech 63, SMU 54

Mavs 130, Lakers 119

The Dallas Morning News

Texas' Leading Newspaper © The Dallas Morning News, 1986 | Dallas, Texas, Sunday, December 21, 1986 | 22 Sections | 75 Cents

A PATTERN OF EXCLUSION

Conroe trial a case in point

By Steve McGonigle
and Ed Timms
Staff Writers of The News

CONROE, Texas — The law officers who prosecuted him and the jury that sent him to death row share a common belief about Clarence Lee Brandley: He is a savage man, a homicidal sexual deviant whose criminal appetite will end only with his execution.

Brandley's supporters, though, believe the 35-year-old black man is a living symbol of racial injustice, an innocent victim of a frightened small town's judicial system that judged him not by law and evidence but by the color of his skin.

These conflicting portraits lie at the heart of a controversy that has lingered more than six years in this city of 30,000 about 40 miles north of Houston on Interstate 45.

Indeed, if nothing else, *Texas v. Brandley* may be a classic example of how minorities perceive the justice system after having been denied membership on a jury that determined the fate of one of their members.

"It is not enough in this coun-

Please see PROSECUTOR on Page 21A.

DEATH PENALTY CASES: RACIAL MAKEUP OF JURIES BY COUNTY (in percent)

SOURCE: The Dallas Morning News

The Dallas Morning News

Blacks rejected from juries in capital cases

By Ed Timms
and Steve McGonigle
Staff Writers of The News
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For all 15 men tried for capital murder in Dallas County since 1980, prosecutors got what they wanted: the death penalty and overwhelmingly white juries.

Of the 180 Dallas jurors who condemned those men, only five were black. There were 37 other blacks legally qualified to serve on the juries, but prosecutors barred 34.

The prosecutors' use of peremptory challenges — dismissing potential jurors without having to give a reason — meant that nine of every 10 blacks qualified for the capital murder juries were excluded. That pattern of racial bias, widespread throughout Texas, is described by one black former prosecutor as "the most dangerous kind of discrimination, because it is oftentimes camouflaged with legal clichés."

DISCRIMINATION IN JURIES
Bias in death cases

■ Basis for findings. 22A
■ Survey of blacks' views. 22A

Prosecutors say blacks routinely are excluded from juries because many are soft on defendants, perhaps as a result of their historical distrust of the criminal justice system.

Such exclusion in Dallas County meant that four of the five blacks sent to death row were tried by all-white juries. Two of those in fact, Larry Smith and Michael Wayne Evans, were executed by injection this year after

Please see SOME on Page 20A.

Some experts see racially based pattern

John Fearance looks out of a cage that "dangerous" inmates are kept in during interviews.

"If you're in a death penalty case and you've got a black kid who grew up ... in the ghetto, and was [other] low, and you've got 12 middle-class, white jurors, you've got nobody on that jury who by definition can identify with your client."

— Dennis Bankey, former legal director, Southern Poverty Law Center

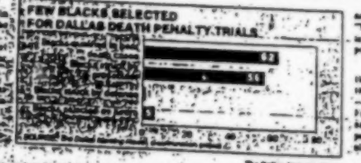
RACIAL COMPLEXION OF DEATH ROW INMATES, JURIES*

County	Number of Cases	Black Defendants	Blacks with all white jury
Dallas	11	7	4
Harris	99	37	19
Bexar	10	7	2
Tarrant	9	7	2
Travis	7	3	2
El Paso	6	0	0
Jefferson	4	3	3
Nueces	3	2	1
Montgomery	3	1	1
Lubbock	2	1	0
McLennan	2	1	0
Smith	2	1	0
Galveston	2	1	0
San Patricio	2	2	0
Total	172	93	51

*All cases involving death row inmates from 15 counties sentenced through Thursday, Aug. 1, 1986.

Clarence Brandley is on death row after an all-white jury in Conroe convicted him of killing a white girl.

Jury choices undermine blacks' trust

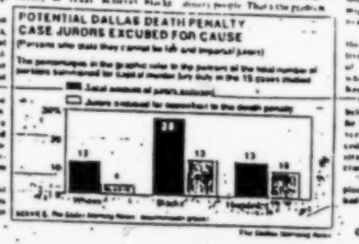


Troy Woods was the only black juror in the 13 Dallas County capital murder trials to hear a case against a black defendant.

POTENTIAL DALLAS DEATH PENALTY CASE JURORS EXCUSED FOR CAUSE

(Persons who state they cannot be fair and impartial jurors)

The percentages in the graphic color in the blacks of the total number of persons summoned for Legal Jurisdiction jury duty in the 13 Dallas District Courts.



Prosecutor cites fear of pressure on black jurors

I was more or less what you would call a compulsive gambler, loved the fast life. I was in the process of slowing down, getting a place to settle down.

— Clarence Brandley, death row inmate

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Conroe defendant still hopes to be freed

Continued from Page 31A

Racism and injustice, according to State District Judge Jim Kesahan, belong in Conroe's past. "You'll find that these days Montgomery County is not that benighted."

"I think we all expressed some guilt because the young lady (Cheryl Fergeson) was a visitor of this town. And I think we took it on ourselves to feel that guilt."

— Carl Barton Jr., mayor of Conroe

"Clarence (Brandley) was black and there was a dead white girl, and he was the only one on trial and he was an easy target."

— Don Brown, defense attorney

Half of blacks back death penalty, survey finds

Computer analyzed jury selection data

This Appendix contains the text of a newspaper article, printed from Westlaw. A photocopy of the same newspaper article is reproduced in Appendix 12. The photocopy is less legible, but includes photographs, charts and/or graphs which are not included in this Appendix.

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NEWS

A PATTERN OF EXCLUSION

Blacks rejected from juries in capital cases Series: DISCRIMINATION IN JURIES

Ed Timms, Steve McGonigle
1986, The Dallas Morning News

For all 15 men tried for capital murder in Dallas County since 1980, prosecutors got what they wanted: the death penalty and overwhelmingly white juries.

Of the 180 Dallas jurors who condemned those men, only five were black. There were 57 other blacks legally qualified to serve on the juries, but prosecutors barred 56.

The prosecutors' use of peremptory challenges -- dismissing potential jurors without having to give a reason -- meant that nine of every 10 blacks qualified for the capital murder juries were excluded. That pattern of racial bias, widespread throughout Texas, is described by one black former prosecutor as "the most dangerous kind of discrimination, because it is oftentimes camouflaged with legal cliches.'

Prosecutors say blacks routinely are excluded from juries because many are soft on defendants, perhaps as a result of their historical distrust of the criminal justice system.

Such exclusion in Dallas County meant that four of the five blacks sent to death row were tried by all-white juries. Two of those, in fact, Larry Smith and Michael Wayne Evans, were executed by lethal injection this year after twice being tried and convicted by all-white juries.

The only black allowed to pass judgment against another black was one who told prosecutors that Texas' form of execution -- lethal injection -- was too humane. "It's too quick,' he testified. "They don't feel the pain.'

These are among the findings of an ongoing investigation by The Dallas Morning News examining jury selection in Dallas and 14 other

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Texas counties. The analysis included a review of the records of 133 of 232 inmates on death row as of Aug. 1.

The 15 counties, which accounted for almost 60 percent of inmates on death row, represented major geographic regions and included the five largest metropolitan areas in the state. In counties whose black population amounted to at least 10 percent, the investigation also found evidence of racial discrimination in jury selection.

In Dallas County capital murder cases since 1980, blacks had a 1-in-12 chance of being selected as jurors, compared to a 1-in-3 chance for whites and a 1-in-4 chance for Hispanics.

Capital cases, which carry mandatory life sentences or the death penalty, are limited to murders of law enforcement officers or slayings committed in the course of certain other felonies, including robbery, rape and kidnapping.

Several legal experts and community leaders say the findings show that peremptory challenges are being used by prosecutors as tools of discrimination against defendants facing the most visceral decision of criminal justice -- execution.

Frank Williams, criminologist with the Criminal Justice Center at Sam Houston State University in Huntsville, analyzed The News' findings. The probability that blacks were eliminated by chance is "1-in-10,000,' he said.

State District Judge Larry Baraka, Dallas' first black felony prosecutor, said The News' findings reaffirm his conclusion that race is the primary reason prosecutors use peremptory challenges to bar blacks.

"Knowing Dallas County and knowing the DAs' practices, I know that's what they're doing.'

Jack Boger, assistant counsel for the NAACP Legal Defense Fund, said the findings establish a pattern:

"The minority community is being told that it doesn't count as much in the criminal justice system. . . . .They certainly don't count as jurors and they're being told they need not apply, or if they apply, they will not be, in effect, hired as jurors.'

In a series of articles published last March, The News documented virtually the same pattern of discrimination in 100 randomly selected felony trials in Dallas County.

In April, a landmark U.S. Supreme Court decision, Batson v.

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Kentucky, prohibited . . use of peremptory challenges in a racially discriminatory manner, saying such practices undermined "public confidence of our system of justice.' In a concurring opinion, Supreme Court Justice Thurgood Marshall cited The News' findings as an example of "systematic exclusion' that violated the 14th Amendment guarantee of due process under the law.

Henry Wade, Dallas County's district attorney for 36 years, said he did not know the specific reasons his prosecutors excluded blacks in capital cases. Wade speculated these blacks were not seated as jurors because prosecutors believed them to be sympathetic toward defendants.

Wade said his office has tried to impanel more blacks on juries in the past five to 10 years. "But I don't believe in putting someone on there just because he's black,' Wade said. "I want someone on there who's going to vote for the state.'

Assistant District Attorney Norman Kinne, who has tried 11 capital cases, more than any other prosecutor on Wade's staff, suggested that most blacks were excluded because they expressed reservations about the death penalty.

Kinne said prosecutors have not intentionally selected all-white juries. "It's just the way things fell,' he said.

While The News' analysis revealed a pattern of prosecutors barring blacks, blacks themselves also shoulder some of the responsibility for the prevalence of all-white juries in capital cases.

Potential jurors in capital cases are screened individually by both prosecutors and defense attorneys. If during the questioning, they state they cannot be impartial, the judge dismisses them for "cause.' After screening, each side has 15 peremptory strikes that allows it to cut potential jurors without explanation. The first 12 remaining are impaneled as jurors.

In Dallas County, blacks are three times more likely than whites to be excused for cause after saying they cannot assess the death penalty, The News' inquiry showed.

In Harris County, only 8 percent of the jurors in capital cases were black. But blacks there were more likely to hear the cases of other blacks; 65 percent of black defendants had at least one peer on his jury, by far the highest percentage among the 15 counties examined by The News.

Almost 80 percent of the black inmates on death row from the

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remaining 14 counties faced all-white juries.

"Never in the history of the state of Texas has a white person been sent to death by an all-black jury,' said Harris County Justice of the Peace Al Green, president-elect of the Houston branch of the NAACP. "It has never been done. . . . .Somehow we've come to accept the notion that it's all right for a black defendant to be put to death by an all-white jury.'

John Fearance and Ronald Curtis "Buffalo' Chambers are two of the three surviving black inmates on death row from Dallas County. Counting retrials, both have been tried and convicted twice by all-white juries.

"There's no justice to it,' Fearance said from behind a heavy mesh screen at the Texas Department of Correction's Ellis I Unit near Huntsville. Fearance was convicted of the 1978 stabbing death of an East Dallas man while burglarizing his house.

"They have their mind made up,' he said. "They've already tried you before they've actually tried you.'

Chambers, on death row for the 1975 slaying of a Texas Tech University student during an abduction-robbery, said prosecutors didn't want to take a chance at justice.

"You're sitting there and you start seeing only white people going on the jury, right? Well if you're a black dude, and you see all these white people that are going to be on your jury -- the judge, too -- you want somebody who can understand you.'

Houston lawyer Percy Foreman has, by his own estimation, tried more death penalty cases than anyone. He believes that, given the same evidence, a black is more likely to be sentenced to death than a white.

The reason, Foreman asserts: "Racial prejudice on the part of the jurors.'

Beaumont lawyer Gaylyn Leon Cooper, the first black felony prosecutor in Jefferson County, believes black jurors mitigate racist impulses.

"The black juror won't go in and say, "Well, you know how these people are,' or "I'm afraid of these people,' ' Cooper said.

Minority representation on capital murder juries also is seen as a way to ensure that mitigating circumstances are at least considered.

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"If you're in a death penalty case and you've got a black kid who grew up . . . in the ghetto, and was fatherless, and you've got 12 middle-class, white jurors, you've got nobody on that jury who by definition can identify with your client,' said Dennis Boskey, former legal director of Southern Poverty Law Center in Montgomery, Ala.

State Sen. Craig Washington, a Houston defense lawyer, said the secret deliberations of 12 white jurors sends a negative message to the minority community.

"If I'm outside the door when the decisions are being made, I'm suspicious of the decision,' Washington said. "If you're being fundamentally fair and your decision is right, then you shouldn't mind me watching it being made.'

The Rev. Zan Holmes, pastor of Dallas' St. Luke Community Methodist Church and a former Texas legislator, said blacks more often are crime victims than whites. "Blacks have a lot at stake in the criminal justice system and want to see justice done.'

For more than 20 years, the same U.S. Supreme Court decision that condemned the use of peremptory challenges "to deny the Negro the same right to participate in the administration of justice,' in practice gave prosecutors free rein.

Defense lawyers complained that Swain v. Alabama demanded an unattainable standard of proof; the ruling permitted the use of peremptory challenges in individual cases, and required documentation of systemwide discrimination.

But under the guidelines of the Batson decision in April, if a defense lawyer shows evidence of "purposeful racial discrimination' during a single trial, prosecutors can be compelled to prove they didn't use their peremptory challenges solely to exclude blacks.

The debate now centers on the application of Batson in actual courtroom situations. Prosecutors say it contradicts the traditional intent, which allowed a person to be excused without explanation.

Defense attorneys contend the ruling can easily be circumvented.

"A lot of time is going to be wasted because the prosecutor can always come up with some other reason that would appear equally valid,' explained Houston lawyer Donald W. Rogers Jr.

There is a wide gap between knowing peremptory challenges are being used racially and proving it, according to John Paul Davis, Jefferson County's first black prosecutor and now a municipal judge in Beaumont.

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"The subtleties of discrimination within the criminal justice system are the most dangerous kind of discrimination, because it is often times camouflaged with legal cliches,' he said. "Lawyers can always use one word when they want to use another.'

However many lawyers believe Batson can be used to curb prosecutors' use of peremptories along racial lines.

"A good, articulate prosecutor who actually chooses (jurors) on methods other than race will have no problem with Batson,' said Dallas lawyer Richard Alan Anderson. "If you've got a prosecutor who's obviously choosing on a racial basis and is just trying to make excuses to justify that . . . then you're going to catch those folks.'

University of Iowa law professor David C. Baldus, a nationally known expert in capital murder trials, suggests that lessons learned in job discrimination suits might be applied to jury selection.

In those cases, employers have been found liable for rejecting minority job applicants whose lawyers proved they had the same characteristics as whites who were hired.

Prosecutors who have been successful after picking all-white juries are not likely to change their formula. And that formula, many defense lawyers claim, was etched in an era of segregation and passed blindly to a new, more enlightened generation that nevertheless is practicing age-old discrimination.

"The practice that's been going on in that courthouse ever since I've been involved in it -- as both a prosecutor and a defense attorney -- is that you just don't question success,' said Brad Lollar, president-elect of the Dallas County Criminal Bar. "They've been picking their juries that way forever . . . and it's always worked.'

Lollar, a Dallas County prosecutor for four years before going into private practice, said no one "necessarily . . . came up to me and said directly, "Don't take a black on a jury.' It wasn't that obvious.

"What we were told to do was go around and watch how the experienced prosecutors did things. And it didn't take a Rhodes scholar to figure out that one thing they were all doing was excluding minorities from the jury.'

For Houston lawyer James Stafford, who has appealed the selection of an all-white jury in a capital murder case, the irony is that many blacks eliminated are "probably a lot stronger state's jurors than

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some of the white people.'

While The News' study showed a higher percentage of blacks on Harris County capital murder juries than on Dallas juries -- 8 percent versus 3 percent -- prosecutors there nonetheless used peremptory challenges to strike more than 90 percent of the black potential jurors.

Harris County District Attorney Johnny Holmes said his prosecutors do not use peremptory challenges solely because of race, but added: "I don't know if we can divorce race from individual philosophies of the potential juror.'

Holmes argues that many blacks perceive the judicial system still tainted by historical experiences of racial prejudice and injustice.

"I still get a rap sheet every now and then on a black defendant and somwhere earlier in his arrest career, it shows "black man walking in a white neighborhood.' Now, when you have been subjected to that, or you know people who have, or your family members have . . . it makes one a little bit skeptical of the system.'

And that skepticism, Holmes said, might be reflected in "some type of turn-the-other-cheek punishment' for a capital murder defendant.

Houston lawyer Carolyn Garcia, who has handled the appeals of several death row inmates, disagrees. She points out that blacks who are removed with peremptory challenges already have sworn they can follow the law. And she fears that the exclusion of blacks from juries is creating yet another disenfranchised generation.

"You can never get off the treadmill of negative experiences,' she said. "The only way to break that cycle is to invite those people into that system.'

Dennis Boskey, a Montgomery, Ala., lawyer who specialized in capital murder cases, described Holmes' position as a form of double jeopardy.

"You're saying, "Well, we beat you over the head then and now we're going to kick you off the juries because we beat you back then,' ' Boskey said.

The search for the ideal juror frequently leads prosecutors and defense lawyers along different routes. They look at a disparate assortment of intangibles to guide them, from how a potential juror looks and how much money he makes to the kinds of books he reads.

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"You want a guy w[illegible] roots in the community,' explained Kinne, who teaches other Dallas County prosecutors how to select juries in capital murder cases. "Usually he has some sort of responsible position that he's held for a number of years. None of his close family or friends has been involved in crime or spent time in the penitentiary. He has a basic understanding of the law . . . and doesn't have any disagreement with any of the law.'

Dallas defense attorney Mike Byck, who defended Chambers and two others on capital murder charges, says each side has its own criteria for jurors.

"The district attorneys want a bunch of jack-booted, marching fascists to sit on a capital murder jury,' Byck said. "I want a bunch of yuppie, knee-jerk, no-backbone liberals to sit on my jury because I don't want them to kill my man. They want them to kill the guy.'

Jurors on Texas capital cases once were required to swear that the potential outcome -- either death or life imprisonment -- would not affect their deliberations. Those who could not were excused from jury duty for cause.

But in 1980, the U.S. Supreme Court ruled that only individuals who say they cannot assess the death penalty under under any circumstances can be excused for cause. The case, Adams v. Texas, involved a Dallas County defendant tried for killing a police officer.

In Adams, Supreme Court justices concluded: "To exclude all jurors (for cause) who would be in the slightest way affected by the prospect of the death penalty . . . would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.'

Some legal scholars, as well as Supreme Court Justices William Brennan and Thurgood Marshall, claim prosecutors are abusing the same constitutional rights protected in Adams.

Brennan, in a recent dissenting opinion, wrote that using peremptory challenges to exclude everyone with reservations about capital punishment creates a "hanging jury.'

Many blacks in Dallas express some reservations about the death penalty, yet are kept in the jury pool after saying they could assess death in some circumstances. Kinne said those potential jurors are the ones prosecutors are told to strike with peremptory challenges.

"We teach (prosecutors) that if someone expresses doubts about his ability to follow the law, then you get rid of him,' Kinne said.

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"If it turns out that they're black, that's just how it falls.'

Dallas lawyer Royce West, a black former prosecutor and recent Democratic candidate for district attorney, said he doubts Kinne's explanation of why blacks have been excluded.

"I know, based on my experience not only as a prosecutor but as a defense lawyer, that black people are just as interested in justice and making sure that individuals who don't belong on the street stay off the street.'

A review of trial transcripts in the 15 Dallas County capital cases showed that 33 of the 56 blacks struck by prosecutors voiced reservations about the death penalty. The remaining 23 stated they could assess the death penalty.

Beneath the exacting legal minutiae, the criminal justice system is fueled by the same stereotypes held by the community at large.

In a 1969 speech that later was incorporated into a statewide training manual for prosecutors, former Dallas County Assistant District Attorney Jon Sparling emphasized that minorities "almost always empathize with the accused' and do not make good jurors.

That perception, says defense lawyer Byck, is evident today in prosecutors' jury selection in capital cases.

"I get the impression that they use a racial stereotype much the same, and literally it almost comes out of the Jon Sparling manual where blacks, Jews, well-educated women are too sensitive, too equivocating, too whatever to put on a capital murder jury,' Byck said.

Gaynelle Jones, a black Harris County felony prosecutor, said eliminating people who aren't likely to be receptive to the prosecutor's case -- regardless of their race -- is just common sense.

"I just can't see myself stacking the cards against me,' said Ms. Jones.

Said John Paul Davis, the Jefferson County municipal judge: "I do believe to some extent blacks tend to be more inclined not to be spoonfed by the prosecution. They tend to be a little more independent. . . . .In fact, I think that makes them more valuable on a jury.'

Davis said that while blacks are chosen for some juries, they are "habitually excluded from juries when blacks are defendants, which

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smacks of the fiercest kind of racism.'

Of the four death row cases from Jefferson County examined by The News, one inmate is white, the others black. The News' analysis showed that one black juror was impaneled in the white defendant's trial; the three blacks were sentenced to death by all-white juries.

"We look at who will enforce the law as we see it, and who won't,' said Jefferson County District Attorney James S. McGrath. "More blacks, through my experience, would be against, or weaker on, the death penalty than other groups. We may be influenced to that extent.'

However, McGrath said, his prosecutors never have "systematically excluded' any ethnic or racial group.

"We're cognizant of the fact that certain groups of people make the best jurors,' he said. "If you want a fine jury, get yourself 12 Germans on there, and you're going to fly. Statistically, German people are more strict in law enforcement than any group that we know of.'

Beaumont lawyer Cooper, a former assistant on McGrath's staff, said he was never told not to let blacks on a jury, but felt some pressure.

"Any time a jury came back with what was less than considered to be the appropriate punishment from a prosecutorial point ofview, then a reason had to be attached," he said. "And I might be asked, "How many blacks were on the jury?' '

John Vance, who will succeed Wade Jan. 1 as Dallas County district attorney, said he intends to record the race of each prospective juror in felony trials, and will personally question any prosecutor whose use of peremptory challenges appears to be racially motivated.

In Tarrant County, a written policy prohibits the systematic exclusion of minorities from juries. Juries that convicted four to death row were examined by The News -- three were all-white, the fourth, which convicted a black defendant, included one black juror.

Tarrant County District Attorney Tim Curry said many minorities are "weak on capital punishment' and excused with peremptory challenges for that reason.

Dallas lawyer Mel Bruder, who represented Randall Dale Adams, the defendant in Adams, notes that peremptories also eliminate

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individuals who won't be fair to the defendant, and warns against too vigorous an attack on their use.

"If you don't like them because they're being used in some discriminatory manner, then they'll have to be abolished,' Bruder said. "And I think that would be a greater disservice to the defendants than having them, and allowing the state to strike people who are . . . weak.'

Prosecutors argue that their first responsibility is to get a conviction and find the jurors who will give it to them.

Troy Woods was the only black juror in the 15 Dallas County capital murder trials involving a black defendant. His views on the death penalty were unwavering during jury selection.

"What I call punishment is back to the old Indian days,' he said. "Pour some honey on them and stake them out over an antbed. . . . .That's what I call punishment.'

Woods, 46, was a juror in the trial of Thomas Joe Miller-El, who was sentenced to death in March for the robbery-murder of an Irving motel clerk.

By the time a trial begins, said Holmes, the Houston district attorney, "We've resolved any doubt about the guilt of the accused in our hearts -- this is a guilty son of a bitch and we're trying to find somebody who's going to put him in the pen.'

Sammie Lee Parker was one of four blacks whose opposition to the death penalty kept him from serving on the all-white Dallas jury in 1985 that tried Ronald Curtis Chambers and sentenced him to death.

"I guess the main reason that I'm against the death penalty . . . is maybe 80 or 90 percent of the time there is a black man involved,' Parker testified.

"I am not defending them, because I know we do wrong like everybody, but I think the black man normally gets the tail end of (the) deal.'

Parker's view is shared by many who claim that blacks historically have received harsher treatment from a jury system that has excluded them.

For that reason, many blacks mistrust the legal system. Almost half the blacks summoned for jury service in Dallas County were excluded by the judge because of their stated opposition to the death penalty.

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"Minorities correctly realize . . . that they have little chance at the courthouse, or at least that they're running behind,' said Corpus Christi lawyer Doug Tinker, an authority on jury selection in capital trials. "They go down there and they're scared to death. They're like a rabbit in the headlights of a car.'

George C. Wright, director of Afro-American studies at the University of Texas, believes blacks and whites see the law differently: "The whites see the law as the protectors. Black people see it as the oppressor.'

In 1924, when Texas began using the electric chair for executions, the first four inmates seated -- all in one night -- were black. From 1924 through 1964, 504 defendants were sentenced to death; 63 percent of the 361 defendants actually executed were black.

The last to die in the Texas electric chair -- on July 30, 1964 -- was 27-year-old Joseph Johnson Jr., a Houston black convicted of murder.

Because of several factors, executions in Texas were interrupted from 1964 to 1981: anticipation of a U.S. Supreme Court ruling on the constitutionality of the death penalty; a sweeping 1972 Supreme Court decision that overturned potentially discriminatory state laws; and appeals that tested Texas' capital punishment law passed in 1973.

On Dec. 7, 1982, in Huntsville, Charlie Brooks Jr., a Fort Worth black convicted of killing a car dealer, became the first inmate to be executed by lethal injection in the nation.

Fort Worth lawyer Danny Burns unsuccessfully appealed Brooks' conviction, arguing that the Texas death penalty was "a disproportionately severe and excessive punishment . . . being imposed pursuant to a pattern of racial, economic, and sexual discrimination.'

Statewide application of the death penalty echoes the pattern in Dallas County. Since 1924, 17 whites and 40 blacks from Dallas County have been executed.

Five whites and 17 blacks from Dallas County have been executed during Wade's tenure as district attorney. Ten of the blacks were executed before 1964 for what are no longer capital offenses -- nine for rape and one for robbery with a firearm.

Gerald Goldstein, general counsel for the Texas Civil Liberties Union, said the attitude among many blacks against the death penalty should surprise no one.

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"It should come as no shock to us any more than if we went to Spain after the Inquisition and could find the few Jews left and ask them what they thought,' Goldstein said. "I imagine they would have some problems with the system at that point.'

Houston lawyer Ron Mock, a black, believes the solution to a cycle of skepticism -- one that makes blacks distrust the system and the system mistrust them -- can't be written in the law.

"My changes would involve . . . the hearts and minds of people as a whole to see each other as a brother as equal folks under the law,' he said.

"Those are the things you'd have to change. You'd have to change ordinary people. That's the problem.'

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1.GRAPH (Credit:DMN * Source:DMN) DEATH PENALTY CASES: RACIAL MAKEUP OF JURIES BY COUNTY 2.CHART (No credit given) RACIAL COMPLEXION OF DEATH ROW INMATES, JURIES 3.PHOTO (Credit:DMN-Jan Sonnenmair) John Fearance looks out of a cage that "dangerous" inmates are kept in during interviews. 4.PHOTO (Credit:DMN-Jan Sonnenmair) Clarence Brandley is on death row after an all-white jury in Conroe convicted him of killing a white girl. 5.GRAPH (Credit/Source:DMN) FEW BLACKS SELECTED FOR DALLAS DEATH PENALTY TRIALS 6.GRAPH (Credit/Source:DMN) POTENTIAL DALLAS DEATH PENALTY CASE JURORS EXCUSED FOR CAUSE 7.PHOTO (Credit:DMN-Jan Sonnenmair * This Photo ran in the BULLDOG Edition ONLY) Calvin Williams, a Houston man on death row, was convicted by an all-white jury. 8.GRAPH (Credit/Source:DMN * This Graph ran in the BULLDOG Edition ONLY) CHANCES OF SERVING IN DALLAS DEATH PENALTY TRIALS, BY RACE ; LOCATION: Graphs - NR. Photos: 1. - 2. Oversize Black/White File. 3. Prisons & Prisoners - Texas.

---- INDEX REFERENCES ----

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NEWS

A PATTERN OF EXCLUSION Conroe trial a case in point Series: DISCRIMINATION IN JURIES

Steve McGonigle, Ed Timms

CONROE, Texas -- The law officers who prosecuted him and the jury that sent him to death row share a common belief about Clarence Lee Brandley: he is a savage man, a homicidal sexual deviant whose criminal appetite will end only with his execution.

Brandley's supporters, though, believe the 35-year-old black man is a living symbol of racial injustice, an innocent victim of a frightened small town's judicial system that judged him not by law and evidence, but by the color of his skin.

These conflicting portraits lie at the heart of a controversy that has lingered more than six years in this city of 30,000 about 40 miles north of Houston on Interstate 45.

Indeed, if nothing else, Texas v. Brandley may be a classic example of how minorities perceive the justice system after having been denied membership on a jury that determined the fate of one of its members.

"It is not enough in this country for things to be right, they must also appear right,' said Harris County Justice of the Peace Al Green, president-elect of the Houston chapter of the NAACP. "And this case just doesn't look right.'

Brandley, his attorneys contend, is a condemned man because bigotry blinded an all-white Montgomery County jury to a reasonable doubt that Brandley raped and murdered a white, 16-year-old girl.

In fact, Brandley's lawyers point to at least two other suspects and to scientific evidence that suggests the rapist-murderer could have been a white man.

Brandley, a custodian at Conroe High School, was convicted of capital murder in the Aug. 23, 1980, slaying of Cheryl Dee Fergeson.

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Miss Fergeson, studen. manager of the Bellville High school volleyball team, was slain at Conroe High, where she was attending a volleyball tournament.

"The jury had formed an opinion before the trial even started,' said Brandley in a dispassionate monotone as he sat in an interview room at the Ellis Unit, near Huntsville.

"And after the trial had proceeded so far, I felt like the jury was just disinterested in hearing the facts.'

The Rev. J.P. Jones, a Baptist minister and a member of Conroe Concerned Citizens, a black group that raised funds for Brandley's defense, said Brandley "was railroaded completely' by the justice system.

"The system in Clarence's case was corrupt,' said Don Brown, one of Brandley's defense attorneys. "It was completely prejudiced against him. That jury knew the community expected them to convict, and they were not strong enough to stand up to it and examine the evidence.'

Had prosecutors allowed blacks to serve on Brandley's jury rather than excluding them with peremptory challenges, Brown suggested, the state's evidence would have been found lacking and Brandley would be free.

Texas laws allow both the prosecutor and defense attorney to exclude any 15 prospective jurors without giving a reason, called peremptory challenges. The U.S. Supreme Court ruled in April that such challenges could not be used simply for racial reasons.

Brandley's defense attorneys have asked the Texas Court of Criminal Appeals to grant Brandley a new trial based on new evidence, illegally excluded blacks and suppressed evidence that could have aided Brandley.

Jim Keeshan, the district attorney who prosecuted Brandley, said the state did not try Brandley because he was black but because the evidence pointed to him as the murderer of Miss Fergeson.

Keeshan, now a state district judge in Conroe, acknowledged he struck all the qualified blacks from both the jury that convicted Brandley and an earlier jury that deadlocked on his guilt; he did so, he said, be[illegible]se he feared black jurors might succumb to outside pressure to acq[illegible] Brandley.

"I felt that my job dictated that they (jurors) not only be supportive of law enforcement, but be free of sympathy for the

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defendant, which woul. affect the verdict,' Keeshan said.

While Keeshan "unabashedly' believes Brandley is guilty, he said he regrets the continuing controversy surrounding the case. He conceded that a different jury selection strategy would have muted the cries of racism.

"Obviously,' he said, "that complaint would have been removed had there been a black on the jury.'

Conroe before the 1970s was just another sleepy sawmill town and railroad junction in the piney woods of East Texas. Its population was native Texan, schools were segregated and politics were Democratic.

But the character of the county was overhauled in the 1970s by the building of The Woodlands, a sprawling residential development near the Harris County line, and resort developments along Lake Conroe.

By 1980, the county's population had swelled from 50,000 to 128,000. One-third of the population was born out of state, and almost two of three people commuted at least 45 minutes to work.

The boom did little to improve the status of blacks. As in 1970, about half of all black families lived below the poverty level. While average family income in the county tripled between 1970 and 1980, the average income of black families remained less than half that of white families.

Crime also was on the rise. Although Conroe recorded only six murders in 1980, the city's murder rate of 33.4 slayings per 100,000 population was only slightly less than that of Dallas.

Still, the slaying of Cheryl Fergeson was something unusual. The teen-age honor student had been abducted, strangled and sexually assaulted at Conroe High, a place residents regarded as a safe haven, indeed "almost like a church,' according to one resident.

"Shock would be a minute description,' said Conroe Mayor Carl Barton Jr., recalling the community's reaction. Adding to that horror, he said, was the fact that the victim, a resident of the Kenney community near Bellville, was in Conroe on a school trip.

"I think we all expressed some guilt because the young lady was a visitor of this town,' Barton said. "And I think we took it on ourselves to feel that guilt.'

The murder occurred 10 days before the start of the 1980-81

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school year; Conroe police reacted with a sense of urgency.

"All our people have been called in,' Capt. Monty Koerner, the department's chief of detectives, told reporters the day Cheryl's body was found. "This is priority one. We hope to have this thing wrapped up before school starts.'

Brandley's defense attorneys later contended that police were pressured by parents, who deluged them and school officials with telephone inquiries about the progress of the investigation.

"People had completely tied up the phone lines at the school, saying they weren't bringing their little daughters to school until that rapist was caught,' said Brown, a white defense attorney and former state legislator.

But Jesse Harwell, then principal of Conroe High School, said he could not recall receiving any phone calls from hysterical parents and did not hear of any such calls being made to school security officials.

Prosecutor Keeshan also denied feeling pressure from the community, but conceded the killing was "deeply disturbing.' At the time, he said, he had a 14-year-old son who was one year away from attending Conroe High.

Keeshan said he did not join the investigation until several days after the murder. The district attorney said Koerner told him the investigation focused on the two janitors who had discovered the dead girl's almost-nude body in a loft above the school auditorium's stage.

One of the suspects, Koerner told Keeshan, was Brandley, supervisor of the five-man janitorial crew on duty at the time of the murder. Brandley, the only black janitor, also was the only janitor alone at the time the Fergeson girl was reported missing. He also had sent another janitor to the auditorium loft three times to look for the girl, Keeshan recalled.

Brandley, then 28, had worked at Conroe High School for six months and had been a custodial supervisor about one month. He had returned to his hometown in 1979 from Houston, where he had worked since being discharged from the Army and separating from his wife in 1972.

"I was more or less what you would call a compulsive gambler, loved the fast life,' Brandley said recently. "I was in the process of slowing down, getting a place to settle down.'

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During that time, Brandley acknowledged, he paid a municipal fine for assaulting a Conroe woman. He said paying the fine was more expedient than fighting the charge, which he denies.

Keeshan said he focused his attention on Brandley when he learned that his office had prosecuted Brandley in May of 1979 on an illegal weapons charge that stemmed from another woman's allegation of attempted sexual assault.

"I didn't think we were looking for an ordinary criminal,' Keeshan said. "Because of the nature of the crime, I thought we were looking for someone who had definite problems in his relationships with women.'

The flaw in the prosecutor's hunch was a police-administered polygraph examination of Brandley in which the operator concluded Brandley was truthful when he denied the attack on Miss Fergeson.

But when investigators asked the polygraph examiner's supervisor to review Brandley's test, the supervisor concluded the original results had been misinterpreted. Brandley, he said, actually had been deceptive.

A day later, on Friday, Aug. 29, 1980, Brandley was summoned to school Principal Harwell's office and arrested by Conroe police for capital murder.

From the outset, Brandley's defense team believed that the task of defending a black man accused of raping and killing a white girl in Conroe was formidable.

Not unlike a lot of other towns, Conroe had seen its share of racial violence and unrest. In 1923, a black man accused of raping a white woman was burned alive by a mob on the courthouse square. In 1941, as he sat in a courtroom, a black man accused of a similar crime was shot to death by the victim's husband. The husband was acquitted of murder.

Integration of the Conroe school system went peacefully in the early 1970s, but tempers flared in December 1973 when a white police officer fatally shot an 18-year-old black suspect in the city jail, recalled Tom Bacon, managing editor of The Conroe Courier. An all-white jury in a neighboring county later acquitted the police officer of murder charges.

Racism and injustice, according to Mayor Barton and Judge Keeshan, belong in Conroe's past. "You'll find that these days Montgomery County is not that benighted,' Keeshan said.

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But Brandley's old brother, Ozell, contends that racism in Conroe is no less virulent, just less visible.

"To them, you mind your business, you come to work, and you might say, stay in your place. As long as you stay on your side of the fence, they'll speak with you and what not,' Ozell Brandley said.

One area in which the community has not progressed, some black leaders contend, is in the even-handed administration of justice, particularly when it involves crimes committed by blacks against whites.

"If you're black, you've got two strikes against you before you go (on trial),' said N.L. Archie, a former principal at Conroe's previously all-black Booker T. Washington High School.

Rev. Jones, pastor of Pilgrim Rest Baptist Church in Conroe, was even more blunt: "Kill a nigger, they might give you a medal. But kill a white and you might as well start finding a vein (for lethal injection).'

Avoiding all-white juries is especially difficult for black defendants in Conroe because Montgomery County's population of blacks is small, amounting to only about 5 percent, according to the 1980 census.

The 50-member pools from which criminal juries are selected typically include no more than four or five blacks, said District Clerk Peggy Stevens.

Because prosecutors are allowed to strike any 15 prospective jurors, and since they typically use the strikes to exclude all blacks, said defense attorney Ray Reeves, "it's almost impossible to get what I call a fair jury in Montgomery County.'

Nonetheless, Reeves and the rest of Brandley's defense team decided against seeking a change of venue, Brown said, because they feared the trial might be moved to the victim's home county.

By the time jury selection was completed on Dec. 5, 1980, the defense's expectations had been realized -- prosecutors used peremptory challenges to strike all four blacks who qualified as jurors.

After that jury deadlocked on a verdict, the scenario was repeated seven weeks later when a second all-white jury was seated to hear Brandley's case. This time, prosecutors struck the only three qualified blacks.

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Keeshan maintained that his decision to exclude blacks from both juries was based on the bias he believed the jurors might possess. Some knew Brandley or his family, and others knew lead defense attorney George Morris, a former county attorney and Conroe City Council member, Keeshan said.

"Had we found the proper juror,' Keeshan said, "I would have taken a black on the jury.'

Court records show that each of the seven blacks struck by the prosecution had characteristics similar to Brandley -- all were male blue-collar workers, three were in their 20s and none had an education beyond high school level.

But some of the whites selected as jurors shared similarities in age, employment and education with the excluded blacks. One woman on the first jury had a son who had been defended on a murder charge by George Morris.

Black community leaders said they became suspicious of the state's motive the moment the all-white juries were seated.

"I just figured they wanted to pin it on the boy, and if they got an all-white jury on it, they knew it would operate,' said N.L. Archie, the former high school principal.

The absence of witnesses to Cheryl Fergeson's rape and murder dictated that the state's case against Brandley would be circumstantial.

Keeshan relied heavily on testimony from the four janitors working under Brandley's supervision the day of the murder. Three said they had seen Brandley following a blond-haired girl matching Miss Fergeson's description as she entered a restroom; they did not see Brandley again, they said, for 30 to 45 minutes.

The fourth janitor, Henry Martin "Ickie' Peace Jr., was the man who accompanied Brandley on a search for Miss Fergeson after her coach and teammates reported her missing from the gymnasium area.

Peace, a dyslexic whom prosecutors described as mentally retarded, testified that Brandley directed him to search the auditorium loft
three times, becoming more insistent each time.

The third time, with Brandley accompanying him, Peace said he found Miss Fergeson's body beneath a piece of plywood.

Prosecutors also introduced into evidence hair recovered from

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Miss Fergeson's body that experts said was similar to samples taken from Brandley.

The defense in both trials attacked the state's evidence, criticizing police for failing to test a semen sample taken from the victim and for underexposing photographs of the crime scene. Brandley's attorneys insinuated in their questioning of witnesses that the four janitors had been coached and threatened by law officers to incriminate Brandley.

There also was the question, defense attorneys said, of a reddish-brown hair recovered from Miss Fergeson's body that matched neither that of the victim nor Brandley or Peace.

The prosecution argued to the jury that the victim could have picked up the hair from a toilet seat, but the defense contended that the donor had to have been involved in the assault on Miss Fergeson.

Brandley testified at the first trial, but not at the second. He said that during the time he was away from the other janitors, he was in his office smoking a cigarette and listening to the radio.

At the second trial, Keeshan noted that the victim was raped while unconscious or dead and that Brandley once worked at a funeral parlor.

"Whoever did this was not repelled by a dead body,' he said.

The defense countered that Brandley was framed by police to satisfy a public outcry that someone be convicted. Despite those efforts, the defense contended, the state had not proved beyond a reasonable doubt that Brandley was the murderer.

The first jury deliberated for two days before a mistrial was declared. The vote had been 11 to 1 for conviction.

The second jury deliberated about 80 minutes before convicting Brandley and another 55 minutes before concluding that Brandley posed a continuing threat to society and should be executed.

Brandley's supporters contend that racism surfaced during deliberations by both juries. In each case, they said, jurors who had doubts about Brandley's guilt were intimidated into abandoning their position.

Defense attorney Brown also contended that the racial makeup of the jury denied Brandley a presumption of innocence from the start.

"Clarence was black and there was a dead white girl, and he was

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the only one on trial and he was an easy target.'

The juror who deadlocked the first trial -- a white, middle-aged, midlevel manager with an energy company -- confirmed in an interview that he was the target of racial insults from other jurors. He declined to discuss the case further, saying he feared harassment from the community.

The foreman of the first jury, George Branch of Conroe, denied that the holdout was called racial names, but acknowledged that his refusal to change his position made deliberations with the other jurors "quite intense.'

"Basically, he just didn't believe in capital punishment,' Branch said of the holdout. "He should never have been selected as a juror.'

Branch said he and 10 other jurors voted to convict Brandley not because he was black but because all the evidence pointed to his guilt.

"In the absence of an eyewitness, to me, that case couldn't have been more cut-and-dried as far as finding the person that committed the crime,' Branch said.

He said he did not think a lack of blacks on the jury made a difference in deliberations, but noted "had there been a black person on the jury, and he had not voted for conviction, there would have been some prejudice there at that point.'

A member of the second jury echoed Branch's sentiments that the evidence pointed to Brandley and that race played no part in the jury's decision.

"Nobody was under any real pressure," recalled Hillry Truitt of Conroe.

"I take a man for what he is, how he is,' Truitt said. "I don't care what color he is . . . .As far as I am concerned, he (Brandley) was just a man.'

The jury's verdict notwithstanding, the issue of Clarence Brandley's guilt didn't die, not even with his incarceration on death row.

A year after his conviction, Brandley's attorneys discovered that all the exhibits in the trial, including the controversial hairs removed from the victim's body, had been lost by a court employee.

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And last May, a 2. ,ear-old woman told Montgomery County prosecutors that her former common-law husband, a one-time janitor at Conroe High School, confessed to her in August 1980 that he was leaving town because he had "killed a girl at the high school.'

Brenda K. Medina of Cut and Shoot, northeast of Conroe, testified at a court hearing last summer that she had kept silent because she believed her husband was making an excuse about leaving town to avoid paying her child support.

She said she did not realize that Brandley had been sentenced to death until this spring when a neighbor told her.

James Dexter Robinson, 26, Ms. Medina's former husband, denied at a subsequent hearing that he had made any such statement.

And though Robinson insisted he left Conroe in early August, two other janitors testified they had seen Robinson at the high school the morning of Aug. 23, the day Miss Fergeson was killed. They said they had not mentioned it before because they did not think it important.

Also at the hearing, defense attorneys presented testimony from John Henry Sessum, a former high school janitor, who said he had lied at Brandley's first trial about seeing Brandley following a blond girl. Sessum, saying he lied because he was threatened by police, testified in the hearing that he had seen another janitor, Gary Michael Acreman, talking to the girl.

Acreman's former father-in-law, Edward Payne, testified that Acreman had told him the day of the murder that he needed to return to school to retrieve some clothing from a dumpster.

Miss Fergeson's clothing was found in a bag inside a dumpster behind the high school cafeteria two days after her body was discovered.

Payne said he had not revealed Acreman's admission because Keeshan had told him, "I've built my case, and we know who did it.'

"He more or less told me to shut up, so that discouraged me from trying to help,' Payne testified at the hearing.

Keeshan denied he discouraged Payne from testifying.

A former assistant district attorney in Keeshan's office, Frank Robin Jr., testified at the hearings that he saw a report that had implicated Peace in a series of sexual advances in nearby Cleveland, and had showed it to defense attorney Don Brown.

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Keeshan denied kno..ng about the report on Peace. ..: the time of his testimony, Robin, the former prosecutor, was an inmate in the federal prison in Texarkana, serving a sentence for bribery and obstruction of justice.

In late October, state District Judge Lynn Coker concluded that the testimony of Ms. Medina and Robin was not credible and that the defense had failed to prove Keeshan had suppressed evidence. He also ruled that Brandley lacked legal standing to complain about the exclusion of blacks from his jury.

Coker recommended that Brandley's request for a new trial be denied. An execution date for Brandley has not been set, pending the outcome of his appeal before the Texas Court of Criminal Appeals in Austin.

Brandley, meanwhile, says he hopes to be freed, and looks forward to being reunited with his five children.

As Brandley sits in prison, he doesn't deny he is bitter toward the
judicial officials who sent him to death row six years ago.

"When someone is supposed to be in the position to administer justice and see that the type of thing that happened to me doesn't happen, and they themselves are a part of it -- that's the only thing I find real hard,' he said.

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PHOTO (Credit:DMN-Jan Sonnenmair) Racism and injustice, according to State District Judge Jim Keeshan, belong in Conroe's past. "You'll find that these days Montgomery County is not that benighted." ; LOCATION: Judges-Texas.

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NEWS

HALF OF BLACKS BACK DEATH PENALTY, SURVEY FINDS

Steve McGonigle, Ed Timms

Half the blacks summoned in capital murder juries in Dallas and Houston would vote to impose the death penalty in appropriate cases, but only one in five believes capital punishment is administered fairly.

Two of three blacks summoned in death penalty cases, contacted in a telephone survey by The Dallas Morning News, question the morality and the racial uniformity of capital punishment. Blacks, in their opinion, more often are the targets of capital punishment than whites.

However, only about one third of those questioned said they were against the death penalty under any circumstances.

Three researchers in jury attitudes said The News' survey shows widespread skepticism among blacks toward the death penalty that nonetheless would not disqualify them under Texas law from serving on a capital murder jury.

"Black people fear the death penalty,' said psychologist Robert Gordon. "They're not against it, but they fear the death penalty, that it will be used for improper purposes and as a method of social control, of racial control.'

Despite such reservations, Gordon said, the survey shows that a majority of blacks likely would be conscientious death penalty jurors.

"Psychologically, it's a more honest person,' Gordon said. "It better expresses the human condition than someone who expresses no equivocation, without any amount of moral ambivalence.'

Gordon, psychologist Leon Peek and Frank Williams, a criminologist at Sam Houston State University in Huntsville, said The News' survey is consistent with similar studies they have conducted.

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Those studies sho[w] [t]hat six of 10 blacks surveyed favor the death penalty, compared to eight out of 10 whites who expressed support. A 1985 nationwide Media General-Associated Press poll showed 84 percent of Americans support capital punishment.

The News' survey was conducted Dec. 2-9 and included telephone interviews with 210 blacks summoned for 84 capital murder juries during the past 10 years. The analysis of those interviews was done by The News' market research department. Sixty percent of the respondents lived in Dallas County. Fifty-three percent were women, 73 percent were aged 25 to 64 and one percent was unemployed.

Fifty-three percent of the respondents said they were opposed or strongly opposed to the death penalty. Seventeen percent were neutral. Twenty-eight percent said they favored or strongly favored capital punishment.

The two most common reasons cited in their opposition to the death penalty were personal and religious beliefs, which were voiced by a total of 56 percent of the anti-death penalty respondents.

Many death-penalty opponents said they did not believe in retribution or taking responsibility for deciding a fellow human being's fate.

"There is only one judge, and that is God,' said Berneice Mims, a 48-year-old Houston homemaker. "I don't have the right to take someone's life. That makes me as bad as he is.'

Others said they worried about making irrevocable mistakes.

"There are so many crooked things going on today, like they find someone guilty in a shadow of a doubt, and a year later they are not guilty, and they could have been dead,' said Dallas truck driver C.W. Jones.

Among those who favored the death penalty, 30 percent said certain crimes warrant capital punishment. An additional 22 percent cited the deterrent effect of the death penalty as the basis for their support.

"I think you do not turn people loose who have a desire to kill. Putting someone in jail for a murder is not a deterrent to crime. I would not turn a mad dog loose on the street,' said Houston postal worker Elmo Garrett, 53, one of 12 jurors who sent Anthony Ray Westley to death row.

Many other people said they believed in the concept of the death penalty but do not support the seemingly arbitrary manner in which it

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is applied.

"They do some, and some they don't. If they executed everybody it would be different. It's an unfair system the way it's done,' Gloria Dunn Thompson, a Dallas homemaker.

James Belt, a Dallas lawyer, said his objection to capital punishment is the justice system's apparent color-consciousness.

---- INDEX REFERENCES ----

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STATE ~~EXHIBIT~~ #1
~~AFFIDAVIT~~

PLEASE PRINT ALL ORMATION

JUROR NUMBER: 28

4/11

1. NAME: Warren (LAST) Joe (FIRST) Alfred (MIDDLE) (MAIDEN (If applicable)

ADDRESS: 4123 Telstar TOWN: Dallas

HOME PHONE: 337-5591 WORK PHONE: 330-0321

EMPLOYER: Kroger Food Stores NAME OF SUPERVISOR: George Parmer

MARITAL STATUS: (Circle one) Single/(Married)/Divorced/Widowed/Separated

AGE: 45 DATE OF BIRTH: 8-16-40 PLACE OF BIRTH: Linden

OCCUPATION: Market Manager

SPOUSE'S NAME: Dorothy Warren DATE OF BIRTH: 9/2/46

Please give the following information as to each of your children: Name, Sex, Age, Date of Birth, Marital Status, Occupation, Present place of residence:

DeShaunda Clark, Female 24 12/5/61 Married Housewife Homemaker
Bengy Warren, Male 18 years old Born 8/8/67 Single Student, My Ho
Alex Warren Jr. Male 17 yrs old Born 12/6/69 Single Student, my H

2. Please list any place other than Dallas County where you have PREVIOUSL RESIDED:

Marietta Texas

3. Are you a member of a local church, temple, or religious organization? If so what is its name and location?

Salem Baptist Church. Dallas Texas

ATTENDANCE (circle one):

a. more than once a week
b. every week
c. frequently
d. occasionally
(e.) rarely
f. never

4. What activities, if any, other than attendance, are you involved with a your present church, temple or religious organization?

None

5. Do you watch or listen to any religious programming?

a. more than once a week
(b.) every week
c. frequently
d. occasionally
e. rarely
f. never

6. ... you a member or financial suppor ... of any media church? (700 Clu... Oral ...arts, etc.) (yes) (no)

7. Have you ever studied for the ministry, or held similar church responsibilities?

NO

8. What civic clubs, societies, unions, professional associations or other organizations have you been in and are you a member of?

Local 540 Meat Cutters Union

9. What offices are you holding, or have you held in the past, in these organizations?

NONE

10. What are your hobbies, favorite recreations, pastimes and spare time activities?

Fishing, Gardening, Softball

11. Do you subscribe to and regularly read a newspaper? (yes) (no)

If yes, state name of newspapers. Dallas Times Herald

12. What is your favorite movie? MOSES

13. What is your favorite TV show? Cosby Show

14. What was the last book that you read? ONE Minute MANAGER

15. Have you ever read a book about a murder trial? (yes) (no)

16. What is your favorite radio station? KKDA 104

17. Do you subscribe to or regularly read any magazine(s)? (yes) (no)
If so, which magazine(s)?

18. Do you or have you displayed a bumper sticker on your personal or family car? (yes) (no)
If your answer is "yes", please state the message on the sticker(s):
Dallas Cowboys + If You Can Read This You Are To Close

19. Have you ever owned personalized license plates? (yes) (no)
If your answer is "yes", please state the message on the license plate(s):

20. What is the highest grade you completed in school? If you did not complete high school, do you have a GED?

12th Grade

21. If you attended college, what was your (a) major subject: (b) minor subject: (c) name of college: (d) location of college: (e) did you graduate?

No College

22. Please describe any vocational or educational courses you may have attended: Night Training Courses also Management Training Course

23. If you were in the service: What branch: Army

Did you volunteer or enlist: Volunteer Re-enlist: No

Highe... ank or grade attained: Private

Duties.

In combat: None

24. Have you ever held or sought political office: No

If yes, what office held:

Sought: When held or sought:

25. Are you, your spouse, or any member of your family presently or have yo... they in the past been a member, volunteer, or an employee of a law enforcem... organization such as a city, county, state, or federal policeman, constable, ...eputy sheriff, Texas Ranger, Texas Department of Public Safety officer, etc
(yes) (no)
If YES, please state the following: Position and date held:

Brother was in police force in New Jersey

26. Are you, your spouse, or any member of your family presently or have yo... or they in the past been a member of an auxiliary or police reserve law enforcement branch such as an auxiliary deputy sheriff or constable?
(yes) (no)
If YES, please state the following: Position and date held:

27. Have you, your spouse, or any member of your family ever served as a military policeman? (yes) (no)
If YES, position, branch of service, dates held:

28. Have you, your spouse, or any member of your family applied for a job i... law enforcement but subsequently decided not to take the job? (yes) (no)
If YES, what law enforcement position applied for, approximate date of application:

29. Have you, your spouse, or any member of your family ever worked as a secretary, clerk, filing assistant, dispatcher, or backup employee of any la... enforcement agency? (yes) (no)
If YES, please give details including the name of the agency and specific ta... hat you or they performed, along with dates of employment.

30. Have you, your spouse, or any member of your family ever worked in a prison, jail, or detention center of any sort? (yes) (no)
If YES, please give the name of institution, type of institution, dates and position held.

31. Have you, your spouse, or any member of your family ever worked as a security guard or for a detective service? (yes) (no)
If YES, please give the name of business, dates and position held.
My brother About 4yrs ago Dingman's Bank

32. Do you have any close friends who are employed in law enforcement? (yes) (no)
If YES, please state the names of those friends and the law enforcement agenc... by which they are employed.

33. Have you, your spouse, or any member of your family ever been in any way connected with the District Attorney's Office of this or any county? (yes) (no)
If YES, please give what county, position held, dates held.

34. Ha[illegible] you, your spouse, or any family [illegible]ber ever had occasion to use th[illegible] servic[illegible] f the District Attorney's Office any hot checks or complaints c[illegible] miscel[illegible]ous matters before? (yes) (no)
If YES, please explain:

35. Have you, your spouse, or any member of your family or close friend eve studied law? (yes) (no)
If YES, give details:

36. Have you, your spouse, any member of your family or close friend ever studied, (a) psychology: (b) sociology: or (c) criminology? (yes) (no)
If YES, give details:

37. Do you have any prejudice for, against, or fixed opinions concerning psychiatric or psychological testimony? (yes) (no)

38. Have you ever heard of an individual named Douglas Walker? (yes) (no)

39. Have you ever heard of an individual named Donald Ray Hall? (yes) (no)

40. Have you ever heard of an individual named Thomas Joe Miller-El, the defendant? (yes) (no)

41. If either you or your spouse were in the armed forces, did either of you ever serve on a court martial? (yes) (no)
If YES, please explain:

42. Have you ever had a pleasant or an unpleasant experience involving law enforcement? (yes) (no)
If YES, please explain:

My Son was Involved in An Accident & Stuff We had Issue Some Meetings

43. Please state your and yours spouse's present occupation. How long have you worked in this capacity?

Market Manager 9 years

SPOUSE: Operator 19 years

44. What are your and your spouse's present duties in regards to your preser occupation?

Same as About

SPOUSE: Same as Above

45. Other than your and your spouse's present occupation, what other types c jobs have you and your spouse held?

Taxi Driver, Bartender,

SPOUSE: Waitress

46. Have you ever been interested in any criminal case in Dallas County, Texas? (yes) (no)
If YES, what case and what was your interest? (Such interest could have been through a friend, relative, or generally through T.V., newspaper, or other similar media.)

Some times I see Certain things on TV may I interest Me Personally

47. H[illegible] you, your spouse, member of your [illegible]ediate family, or close friend or rel[illegible] e ever been a victim of a crime. (yes) (no)
If YES, where, when and what type of crime?

Drive by shooting 2 years ago

48. If you were a victim of a crime, was anyone charged with the offense against you? (yes) (no)
If YES, was that person prosecuted in court and what was the result?

49. Have you ever been a witness in a criminal case? (yes) (no)
If YES, explain whether you testified in court and were you a witness for the prosecution or the defense.

50. Have you, your spouse, or close friend or relative, ever been charged, arrested, indicted, or convicted of any criminal offense? (yes) (no)
If YES, please give dates and explain.

The One Mentioned Above

51. Have you served as a juror before? (yes) (no)
If YES, what kind of case was it and what dates?

A Grand Juror? (yes) (no)
If YES, please give dates and details.

52. If you have served on a criminal jury, were you able to reach a decision on guilt or innocence? (yes) (no)
If YES, did the jury or the judge decide the punishment?

After your criminal jury service, were you talked to or contacted by:

a. Judge (yes) (no)
b. District Attorney's Office (yes) (no)
c. Defense Lawyer (yes) (no)
d. Any other party or person (yes) (no)

53. If you have served on a jury, was there anything in your prior jury experience that either upset or agitated you to the extent that such jury service was an unsatisfactory experience? (yes) (no)
If YES, please explain.

54. Have you done volunteer work? (yes) (no)
If YES, for what organization?

School PTA

55. Have you ever been associated with any program or organization involved with the prevention of crime, or the apprehension or punishment of offenders? (examples: Crime Stoppers, MADD, etc.) (yes) (no)
If YES, what organization?

Crime Stoppers

56. Do you believe in the death penalty? (yes) (no)
Please explain your answer.

In Some Cases Yes

57. Do you have any moral, religious, or personal beliefs that would prevent you from sitting in judgment on another human being? (yes) (no)

58. Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution another human being? (yes) (no)

59. Do you know of reasons why you could not sit as a juror in this case and be absolutely fair to both the Defendant and the State, and render a verdict based solely upon the evidence presented to you? (yes) (no)

60. Do you know any of the following persons?

Donald Ray Hall	(yes)	(no)
Mohamed Ali Karimijoji	(yes)	(no)
Anthony Phillip Motari	(yes)	(no)
Monroe Johnson	(yes)	(no)
Donald Bruce	(yes)	(no)
Robert Earl Wilson	(yes)	(no)
Stanley James January	(yes)	(no)
Michael Wayne Johnson	(yes)	(no)
Graeme P. Dowling, M.D.	(yes)	(no)
Patrick Besant-Mathews, M.D.	(yes)	(no)
Charles S. Petty, M.D.	(yes)	(no)
H. G. F. Gilliland, M.D.	(yes)	(no)
K. L. Pollard	(yes)	(no)
J. Perez	(yes)	(no)
J. L. Gentry	(yes)	(no)
C. E. Moore	(yes)	(no)
J. Reed	(yes)	(no)
B. Papke	(yes)	(no)
C. G. Cheek	(yes)	(no)
J. L. Alford	(yes)	(no)
D. McIntosh	(yes)	(no)
M. R. Yeakley	(yes)	(no)
R. Cagle	(yes)	(no)
M. Collins	(yes)	(no)
J. Hallum	(yes)	(no)

Some Cases Yes / Some Cases No
There Are Some Cases DP
Things Happen / that Could Have Been Avoided.
Choice - Went Armed + Did It
Self Defense - No
Accomplish Something - Yes + No
Crim. Background
Background
Cases I Wouldn't To Be Personally Involved.

T. Bulo[illegible]	(yes)	(no)
M. Fo[illegible]	(yes)	(no)
D. Hootman	(yes)	(no)
Richard Gilmette	(yes)	(no)
K. K. Kirby	(yes)	(no)
D. B. Osterberg	(yes)	(no)
C. L. Williams	(yes)	(no)
J. D. Heard	(yes)	(no)
[illegible]. E. David	(yes)	(no)
B. Robertson	(yes)	(no)
C. E. Anderson	(yes)	(no)
G. H. Reyes	(yes)	(no)
Kennard Sonny Flowers, Jr.	(yes)	(no)
Johnny Allen McDowell	(yes)	(no)
[illegible]wanna Bey Bonner	(yes)	(no)
Johnny Bonds	(yes)	(no)
Dave Ferguson	(yes)	(no)
Phillip Bond	(yes)	(no)
G. L. Burke	(yes)	(no)
Larry Fletcher	(yes)	(no)
Mary C. Eppes	(yes)	(no)
James P. Grigson, M.D.	(yes)	(no)
[illegible]lay Griffith, M.D.	(yes)	(no)
Tom Hupp	(yes)	(no)
David G. Eldridge	(yes)	(no)
James Mathews	(yes)	(no)
John Milani, M.D.	(yes)	(no)
[illegible]raig Harrison, M.D.	(yes)	(no)
Joel Budge	(yes)	(no)
Grady Tucker	(yes)	(no)
J. G. Cron	(yes)	(no)
Lynn Lyonn	(yes)	(no)
Jimmy Wooten	(yes)	(no)
D. J. Crane	(yes)	(no)

Richard Terrier (yes) (no)

Lori [illegible] (yes) (no)

Rodney Phillips (yes) (no)

Bob Clepper (yes) (no)

George M. Taylor (yes) (no)

ORIGINAL

No. 01-7602

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
DEC 11 2001
OFFICE OF THE CLERK

October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

CERTIFICATE OF SERVICE

I, Jim Marcus, hereby certify that a true and correct copy of Petitioner's Motion to Proceed *In Forma Pauperis* was served on counsel for Respondent on this 11th day of December 2001, via First Class United States Mail, addressed to:

Ms. Deni Garcia
Office of the Attorney General
Capital Litigation Division
Price Daniel, Sr. Building, 7th Floor
209 W. 14th St.
Austin, Texas 78701

Jim Marcus
Counsel of Record